

77-1300

Supreme Court, U. S.

FILED

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MICHAEL ROSEN, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1978

ED MARGIS PLUMBING AND
HEATING COMPANY, INC.,

Respondent,

— VS. —

SYDNEY M. EISENBERG,

Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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I N D E X

NATURE OF PETITION	1
QUESTIONS INVOLVED	2
STATEMENT OF FACTS	3
ARGUMENT	6
I. Petitioner Was Not Allowed A Fair Trial When The Entire Record Is Viewed As A Whole	6
A. The Trial Court Is Afforded Discretion In Evidentiary Questions But These Rulings Must Be Justified By Reason . . .	6
B. The Trial Court Erred In Excluding Cross-Examination Because It Was Beyond The Scope Of The Direct Exam- ination	7
C. The Trial Court Erred In Sustaining An Objection Based On The Incompetency Of A Witness.	8
D. The Trial Court Erred In Sustaining Objections That Lacked Sufficient Specificity	9
E. Appellant Has Standing To Raise These Issues On Appeal Since Offers Of Proof Were Made On All Issues.	11

F. Appellant Was Denied A Fair Hearing Due To The Extreme Partiality Of The Trial Judge And His Remarks In The Presence Of The Jury	11
G. The Trial Court Erred In Its Instructions To The Jury.	14
H. A Statutory Violation Resulted From The Court's Refusal To Record Closing Arguments	14
II. The Denial Of A Fair Trial Violates Petitioner's Constitutional Rights Under The United States Constitution.	15
CONCLUSION	17

Cases Cited:

<u>Bernfeld vs. Bernfeld</u> , 41 Wis. 2d 358, 164 N.W. 2d 259 (1971)	6
<u>Boller vs. Cofrances</u> , 42 Wis. 2d 170, 166 N.W. 2d 129 (1969)	7
<u>City of Franklin vs. Badger Ford Truck Sales</u> , 58 Wis. 2d 641, 207 N.W. 2d 866 (1973)	11
<u>Lawrence vs. Jewell Companies, Inc.</u> , 53 Wis. 2d 656, 101 N.W. 2d 671 (1972)	14
<u>Marks vs. State</u> , 63 Wis. 2d 769, 218 N.W. 2d 328 (1974)	9
<u>Puls vs. St. Vincent Hospital of Hospital Sisters of Third Order of St. Francis</u> , 36 Wis. 2d 679, 154 N.W. 2d 308 (1967)	17
<u>State, ex rel, Hussong vs. Froelich</u> , 62 Wis. 2d 577, 215 N.W. 2d 390 (1974)	10
<u>State, ex rel, Mitchell vs. Bowman</u> , 54 Wis. 2d 5, 194 N.W. 2d 297 (1972)	11
<u>State vs. Hoffman</u> , 58 Wis. 2d 21, 205 N.W. 2d 386 (1973)	11

<u>State vs. Wind</u> , 60 Wis. 2d 267, 208 N.W. 2d 357 (1973)	10
<u>United States vs. Fry</u> , 304 F. 2d 296 (1962)	14
<u>West Bend Mutual Insurance Company vs. Christenson</u> , 58 Wis. 2d 395, 206 N.W. 2d 202 (1972)	14

Statutes Cited:

Wisconsin Statute 256.55 Reporting testimony.

- (1) Except as provided otherwise in this section, all testimony in all courts of record in every action or proceeding, contested, uncontested or ex parte shall be reported.
- (2) Proceedings had on forfeitures of bail or deposit, pleas of guilty in ordinance violation cases, and pleas of guilty in misdemeanor cases need not be reported except when the maximum penalty may exceed \$500 or 6 months, but the clerk shall keep a record indicating the calling of the case, non-appearance or plea made by the defendant and action taken by the court.
- (3) Voir dire examinations in any civil or criminal action need not be reported unless ordered by the court. Opening statements and closing arguments shall be reported in any action upon request of a party or upon order of the Court. A request to report opening or closing argument shall be made on the record

before any such argument has commenced.

(4) Arguments of counsel on motions made during the course of trial shall be reported, but such arguments on motions made before or after trial need not be reported except upon order of the court.

(5) A record shall be made of the court's advice and defendant's reply under s. 970.02(1)(b).

(6) Preliminary examinations shall be reported.

(7) The reporter shall be readily available during all sessions of court to take any proceedings the court directs 112

Wisconsin Statute 261.08 Substitution
of Judge.

(1) Any party to a civil action or proceeding may file a written request with the clerk of courts for a substitution of a new judge for the judge assigned to the trial of the case. The written request shall be filed on or before the first day of the term of court at which the case is triable or within 10 days after the case is noticed for trial. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(2) After the written request has been filed, the named judge shall

have no further jurisdiction in the action or proceeding except to determine if the request is correct as to form and timely filed, and the named judge shall be disqualified and shall promptly request assignment of another judge pursuant to s. 251.182.

(3) No party shall be entitled to file more than one such written request in any one action, nor many any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

History: 1971c.46,138,296. 11, 114, 115

Wisconsin Statute 885.16 Transactions

with deceased or insane persons

No party or person or his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased or insane person,

or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his own behalf, introduce testimony of himself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given, or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives his or its interest or title, shall be so examined except as aforesaid.

Wisconsin Statute 885.17 Transactions

with deceased agent. No party and

no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through or under whom such adverse party derives his interest or title, when such agent is dead or insane, or otherwise legally incompetent as a

Wisconsin Statute 901.03 Rulings

on evidence (1) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and (a) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (b) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was

apparent from the context within which questions were asked.

(2) RECORD OF OFFER AND RULING.
The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. He may direct the making of an offer in question and answer form.

(3) HEARING OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge 6, 8, 9

Wisconsin Statute 906.01 General rule of competency. Every person is competent to be a witness except as provided by ss.885.16 and 885.17 or as otherwise provided in these rules.

IN THE
SUPREME COURT OF THE UNITED STATES
Term, 1978

ED MARGIS PLUMBING AND
HEATING COMPANY, INC.,

Respondent

-vs-

SYDNEY M. EISENBERG,

Appellant

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WISCONSIN

NATURE OF PETITION

This is a Petition from a decision filed October 4, 1977, by the Wisconsin Supreme Court and an Order denying a rehearing thereof dated January 20, 1978, which resulted from an appeal from the Order entered in the above entitled matter on the 19th day of November, 1975, by the Honorable J. K. Callahan, County Court Judge, Milwaukee County, Wisconsin, ordering judgment for the Plaintiff in the amount of \$3,279.71 together with interests and costs.

QUESTIONS INVOLVED

1. Was Petitioner denied a fair trial when the record is viewed as a whole?

The trial court and the Wisconsin Supreme Court answered this in the negative.

2. Was there a denial of Petitioner's constitutional rights under the United States Constitution in that due process was not afforded?

The trial court and the Wisconsin Supreme Court answered this in the negative.

STATEMENT OF FACTS

This case arose out of a job undertaken by a Wisconsin corporation upon the premises owned by the Defendant-Appellant, Sydney M. Eisenberg. The business mentioned above was a plumbing firm, the building that the work was done on was an apartment complex at 803-813 East Wells Street, Milwaukee, Wisconsin.

The work was done by the Plaintiff corporation without any plans, written authorization and contained many costly errors and mistakes. Thus, when the defendant learned of the amount of the bill, not only was he surprised at the fact that he should be charged at all for work he had not authorized, but when the poor quality and literal destruction of the property became known, he demanded compensation for his damage.

Plaintiff sued on a contract that has never been established. Although the plaintiff corporation is currently in bad standing, it was allowed to take the case to trial and ultimately receive judgment in its favor. This was the result of a series of prejudicial comments and errors by the trial court. The record evinces a complete disregard for defendant-appellant's rights during the course of the trial.

The trial judge was retiring. There had been two previous mistrials before another judge, and he stated that the case would be completed by him without mistrial as his last case. The court's mistreatment of appellant is well noted in the written record.

The basic circumstances on which this lawsuit is based is the installation of a gas line

in each of two buildings which are erected parallel to each other. The purpose of the owner in buying replacement heaters was to have two gas hot water heaters placed on the courtyard side of both buildings, thus freeing the present laundry rooms, located on the outer edge of the buildings, to be converted to apartments. There were gas mains on both ends of both buildings. When the respondent corporation decided to usurp this job, they placed the water heaters in the laundry rooms on the outer edges of the buildings, opposite to the yard between the two buildings. Thus, they successfully destroyed the concept of converting these outside rooms into apartments.

To make matters even worse, instead of running a short gas pipe down from the gas outlets on the outer edges of the buildings, they ran piping from the outlets in the courtyard side clear across each entire building to the opposite gas outlet, thus necessitating a long and expensive piping operation ultimately resulting in the ridiculous charge made by the plaintiff.

On top of all of this, a large pipe now runs across the first floor rooms in this building and is low enough to cause injury to tall people. If the plaintiff claims he was told by the janitor where to place the replacement heater, there already was a gas outlet only a few feet away in each washer-dryer room to which he could have connected to without running pipes across open hallways all across the complete building to the gas connection on the other side. Connections could have been made for a total of \$310.00, according to the only independent expert, engineer, R. Walter Gross (R.P. 427), connecting to the closest gas connection. Plaintiff has a judgment \$4,401.48 for running several lengths of gas pipe

to gas heaters it did not furnish. For these reasons, the defendant-appellant filed his counter-claim.

As mentioned above, the judge made prejudicial comment, after prejudicial comment, excluded permissible evidence favorable to defendant, gave erroneous instructions to the jury and committed other preposterous errors ultimately foreclosing any possible chance to gain a favorable jury verdict.

The trial court erroneously permitted defense counsel to introduce without a foundation, a Dun and Bradstreet credit report concerning defendant-appellant, showing among other things, defendant's refusal to answer the credit reporter's questions, all to prejudice defendant.

Upon appeal to the Wisconsin Supreme Court, this decision of the trial court was affirmed. In reasoning, the justices frankly admitted that many errors had occurred, but escaped reversal by concluding that taken separately the errors were not prejudicial. It is petitioner's ascertain that not only are the errors by themselves prejudicial, when taken a whole, due process of law was violated and justice was not afforded the Petitioner. Clearly a fair trial did not result.

Thus, petitioner, now seeks a Writ of Certiorari to allow him to receive his fair day in Court as he is justly entitled.

ARGUMENT

I. Petitioner Was Not Allowed A Fair Trial When The Entire Record Is Viewed As A Whole.

A. The Trial Court Is Afforded Discretion In Evidentiary Questions But These Rulings Must Be Justified By Reason.

There can be no question that under the Wisconsin Rules of Evidence the Trial Court is given discretion to make determinations on the admissibility of evidence. However, as in all cases of judicial discretion it is error to abuse such discretion and under Section 901.03, if such effects a substantial right of either party or constitutes plain error it is ground for dismissal or a new trial.

The term "abuse of discretion" has been defined as follows, by the Wisconsin Supreme Court:

"The term abuse of discretion exercised in any case by the trial courts, as used in the decisions of courts and in books, implying in common parlance a bad motive or wrong purpose is not the most appropriate. It is really a discretion exercised to an end or purpose not justified by and clearly against reason and evidence." Bernfield v. Bernfield, 41 Wis 2d 358, 365, 164 N.W. 2d 259 (1971).

The trial of this case indicated a multitude of rulings, excluding virtually all of defendant's necessary evidence, having no basis in reason and law. The reasons given by the court for these rulings were either clearly erroneous or had no basis in reason. Due to the fact that appellant

was utterly barred from presenting even the most trivial foundation for his case and counterclaim, he asserts that it is grossly evident that the trial court's rulings affected his substantial rights and amounted to plain error.

B. The Trial Court Erred In Excluding The Cross-Examination Because It Was Beyond The Scope Of The Direct Examination.

In the course of cross examination of Alma Margis by Mr. Eisenberg the following dialog took place.

MR. EISENBERG: "When did you first find out that the defendant was very unhappy and discouraged with what had taken place?"

MR. KREMBSS: "I object to the form of the question. It is too general to the topic and no reference to time."

COURT: "Sustained. It has nothing to do with the facts of cross-examination. That question was not brought out on the original questioning."

MR. EISENBERG: "Is it the court's ruling that cross-examination can't extend beyond the direct examination based on the Supreme Court's interpretation of the evidence?"

COURT: Yes. (R.p. 248, App. p. 28)

The Supreme Court of Wisconsin has specifically rejected and eliminated this reasoning for excluding evidence. Boller vs. Confrances, 42 Wis 2d. 170, 166 N.W. 2d 129 (1969). In that decision, the Supreme Court adopted the wide open

rule or cross-examination, whereby it was left within the discretion of the Trial Court to determine the limits of cross-examination. In this circumstance, however, the Trial Court placed its reasoning entirely on the "beyond the scope of the direct" doctrine. Appellant asserts that this constitutes an abuse of discretion.

This erroneous ruling effects the right of the appellant to establish his case and counter-claim in a court of law. There was a proper objection raised to the denial of this examination. (R. p. 248, App. p. 28). Therefore, under Section 901.03, appellant asserts that this ruling constitutes error.

C. The Trial Court Erred In Sustaining An Objection Based On The Incompetency Of A Witness.

During the redirect examination of Frederick Hornbach, appellant's graduate engineer property manager, the following testimony took place.

MR. EISENBERG: In that letter did you say you were not going to pay him anything?

MR. KREMBIS: I object. This individual is incompetent.

COURT: Objection sustained.

(R.P. 496; see also R.p. 526).

Appellant contends that this ruling is erroneous on its face. Section 906.01 entitled General Rule of Competency reads as follows:

"Every person is competent to be a witness except as provided by ss. 885.16 and 885.17 or as otherwise provided by these rules."

The exceptions deal with the "dead man's rule" and has no bearing here. The rule of disallowing a person's testimony because of incompetency clearly is not the law in Wisconsin. Marks v. State, 63 Wis. 2d 769, 218 N.W. 2d 328 (1974). The use of this rationale was plain error. Mr. Hornbach has been in realty construction, maintenance and repairs since 1939 (R.p. 441). This totaled 36 years of experience.

Because Mr. Hornbach's testimony was a necessary element in the establishment of appellant's case and counterclaim, especially concerning his informing the plaintiff to cease operating on the premises in question, which was excluded by objection (R.p. 496), appellant asserts that another of his substantive rights has been invaded. Again, the Trial Court erroneously barred on invalid grounds, appellant from presenting his case and counterclaim in a court of law.

D. The Trial Court Erred In Sustaining Objections That Lacked Sufficient Specificity.

Throughout the trial of this case, appellant's attempts to present his case and counterclaim were met with a barrage of objections that for the most part were systematically sustained. Appellant asserts that under Sec. 901.03(1)(a) he has the right to much more specific objections than those presented. The Wisconsin Supreme has held that where it is not apparent from the circumstances, a party has a right to a specific objection. Simple objections, "to the form of the question,"

State, ex rel. Hussong v. Froelich, 62 Wis 2d 577, 215 N.W. 2d 390 (1974), or "no foundation", State v. Wind, 60 Wis. 2d 267, 208 N.W. 2d 357 (1973), are not sufficiently specific to meet the burden of this statute. Yet a perusal of the transcript indicates nearly all of Mr. Krembs' objections were simply "immaterial and irrelevant", the most general objection an attorney knows. Yet nearly every one of these objections were systematically sustained by the Trial Court.

There are literally hundreds of examples of this lack of specificity in Mr. Krembs' objections, but perhaps one that best illustrates is as follows:

MR. HUPY: Would you state whether or not you ever authorized the Ed Margis Plumbing & Heating Co., Inc. to do jobs for buildings you own, or corporations you had an interest in?

MR. KREMBS: Objection, immaterial and irrelevant.

MR. HUPY: This whole lawsuit has to do with whether there was a contract or not.

COURT: Objection sustained.

(R.p. 512-513 App. p. 87). This type of rapid fire objection, which in almost its entirety was sustained by the Trial Court, was so vague in its content that it left appellant with no alternative method to present his case and counterclaim so it would meet the requirements of the Court. Thus, appellant asserts he was denied any avenue to present his side of the case and counterclaim and was thereby, denied substantive rights. These methods fly viciously in the face of justice and

and fair play.

E. Appellant Has Standing To Raise These Issues on Appeal Since Offers of Proof Were Made on All Issues.

During the course of the trial, appellant raised four offers of proof. All were summarily denied by the Trial Court. One was raised at the close of plaintiff-respondent's case (R.P. 388) and the remainder were made at the close of trial. (R.p.507,545-548). These offers of proof presented necessary facts on both appellant's case and counterclaim. As stated, none were admitted. Appellant thereby asserts that under City of Franklin v. Badger Ford Truck Sales, 58 Wis 2d 641, 207 N.W. 2d 866 (1973) and State vs. Hoffman, 58 Wis. 2d 21, 205 N.W. 2d 386 (1973) he has fulfilled the conditions precedent to raising these issues on appeal.

F. Appellant Was Denied A Fair Hearing Due To The Extreme Partiality Of The Trial Judge And His Remarks In The Presence Of The Jury.

The Wisconsin Supreme Court has held that no person should have to be tried, either civilly or criminally by a judge who is prejudiced against him. State, ex rel. Mitchell vs. Bowman, 54 Wis 2d 5, 194, N.W. 2d 297 (1972). The facts of this case indicate that on many occasions the judge indicated in the jury's presence his bias against the defendant. He even went so far as to indicate to the defendant that his right to file an affidavit of prejudice under 261.08 of the Wisconsin Statutes would be futile (R.p. 506).

The number of occasions that the judge exposed his prejudice to the jury are too numerous

to be completely covered in this brief. Several examples stand out as most blatant, however.

COURT: While you are presenting the exhibits you can stand up, otherwise sit down and make your arguments to the jury.

MR. EISENBERG: Can I refer to the exhibits?

COURT: Yes. Please sit down. Your reputation goes before you. (R.P. 283-284).

MR. HUPY: I object. He can ask questions, and can let the witness answer:

MR. EISENBERG: I am trying to do my best to answer.

COURT: Oh, no, you're not. You are not to be adding to any answers.

(R.P. 381)

MR. EISENBERG: I have a motion to dismiss.

COURT: Your motion is denied.

MR. EISENBERG: Even without knowing what it is.

COURT: Yes, I have already heard the testimony.

MR. EISENBERG: I move for non-suit.

COURT: Denied.

(R.P. 388-389).

COURT (TO MR. EISENBERG): Wait a second, we are going to stop right here. I am sick and tired of you orating to the jury and deviating from the question. If you can't keep your attorney in line then the Court will keep him in line. (R.P. 503-504).

COURT (TO MR. EISENBERG): I have never tried a lawsuit in which the lawyer was so irritating as you have been in this case. You do not follow the court's direction, you continue to argue and discuss matters that are not pertinent to your direct answer. I want to say that it is the opinion of the court that you wanted that mistrial, and I want this on record, as far as this court is concerned, I was appointed in this case after you have had a previous mistrial, and I am going to try to get this lawsuit to conclusion by submitting instructions to the jury. (R.P. 505).

MR. EISENBERG: I am going to file an affidavit.

COURT: It won't do you any good to file an affidavit of prejudice. (R.P. 506).

A perusal of the transcript will indicate further evidence that shows it was unmistakable to the jury or any other observer of the lawsuit, just how the judge felt about this lawsuit.

In the words of the United States Federal Court, "the cumulative effect of the trial judge's constant and extensive questions asked of witnesses and his occasional remarks tending on occasion to ridicule defendant and his witnesses and to infer that the Court believed defendant was guilty, destroyed the atmosphere of impartiality and denied defendant a fair and impartial trial. United

States vs. Fry, 304 F. 2d 296 (1962). Appellant contends that the judge's attitude and comments in this case are similar in that they, too, destroyed the atmosphere of impartiality that is supposed to have surrounded the trial.

G. The Trial Court Erred In Its Instructions To the Jury.

The appellant asserts that the trial court erred in its instructions to the jury. Plaintiff did not attempt to amend the complaint. The court erroneously instructed the jury: 1. In quantum meruit while the complaint and the thrust of plaintiff's suit was clearly grounded in contract law; 2. In agency; and 3. In future profits.

As has been repeatedly stated by the Wisconsin Supreme Court, instructions to the jury must be warranted by the evidence and where the evidence supports a requested instruction, it should be given. West Bend Mutual Insurance Company vs. Christenson, 58 Wis. 2d 395, 206 N.W. 2d 202 (1972). Additionally, an instruction should be specific and tailored to fit the evidence.

Lawrence vs. Jewell Companies, Inc., 53 Wis. 2d 656, 101 N.W. 2d 671 (1972). Appellant contends that the trial court record illustrates that the court's instructions were clearly erroneous and not well based on the evidence at hand. Such error was prejudicial to the appellant and plainly warrants a dismissal or new trial.

H. A Statutory Violation Resulted From The Court's Refusal To Record Closing Arguments.

A statutory violation occurred when the trial court refused to record the closing arguments to

the jury, although this was vigorously objected to by appellant (R.p. 562). Wisconsin Statutes 256.55 states in paragraph three:

"Opening statements and closing arguments shall be reported in any action upon request of a party or upon order of the court. A request to report opening or closing arguments shall be made on the record before any such argument has commenced."

Appellant's request for recordation, objections to its denial, and motions for a mistrial as a result thereof were all summarily denied by the Trial Court. Consequently, objections to alleged improprietary statements made by Respondent's counsel during the closing arguments and the alleged misstatements themselves are not a part of the record.

II. The Denial Of A Fair Trial Violates Petitioner's Constitutional Rights Under the United States Constitution.

As has been exhibited the Trial Court and the Wisconsin Supreme Court have, at every turn, distorted and interpreted matters in this case to petitioner's disadvantage. The Trial Court has committed numerous errors and the Wisconsin Supreme Court has noted many of these errors but as noted in their decision, it is their opinion that "not all errors at trial mandate a reversal." Margis v. Eisenberg, P.G. No. 75-581 (Unpublished 1977). However, it has been the law of the land and the policy of the law to afford all litigants a day in court and impartial trial. Quinn Distributors, Inc. vs. Miller, 43 Wis. (2d) 291, 168

N.W. 2d 552 (1969). A person must be free to vindicate in court his rights secured by the Federal Constitution. Cross v. Powers 328 F. Supp 899 (O.C. Wisc. 1971).

One of these most basic rights is the principle that fair trial in a fair tribunal is a basic requirement of due process. A biased decision maker is constitutionally unacceptable and even the probability of unfairness should be prevented. Withrow vs. Larkin, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). The trial court herein exemplified unparalleled bias. It is not reasonably arguable that the probability of unfairness was avoided, indeed it was obvious.

There is only one avenue that can be followed to allow petitioner his proper due process rights and that is by a new trial. The first step would, of course, be to grant Petitioner a Writ of Certiorari which only this Court can do. With the unfairness of the trial court and the Wisconsin Supreme Court behind him, this should be the least that Petitioner is entitled to.

CONCLUSION

The great number and severe impropriety that illustrates the misuse of judicial functions if not cause of dismissal in and of themselves certainly support appellant's assertion that a reversal or a new trial is necessary in the interests of justice. In Puls v. St. Vincent Hospital Sisters of Third Order of St. Francis, 36 Wis. 2d 679, 154 N.W. 2d 308, (1967) the Wisconsin Supreme Court said that a new trial should be ordered in the interest of justice when the Court, viewing the case as a whole is convinced that there has been a probable miscarriage of justice. The probability of such a miscarriage in the instant case is very substantial when viewing the conduct of the trial court.

In conclusion, appellant asserts that the repeated errors and unwarranted actions and statements made by the Trial Court necessitate that a new trial be had. The prejudicial comments made by the Trial Court with reference to the appellant, not allowing material testimony to be entered as evidence on appellant's behalf, motions and objections not heard and summarily denied, errors in the making of the court record and the matter of whether respondent even has the power to maintain this action are more than sufficient grounds for declaring a miscarriage of justice and dismissing the action with prejudice or in the alternative, granting a new trial. His method of denunciation was obviously unjudicial; in the presence of the jury, it was a nightmare. Any litigant has a right to have his case tried in a laboratory atmosphere, with dignity and mutual respect, regardless of religion, color and creed. Only this Court can permit such a fair trial to be held by allowing petitioner's Writ of Certiorari.

Respectfully submitted,

M. L. EISENBERG & ASSOCIATES
Attorneys for Petitioner

APPELLANT'S APPENDIX

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STATE OF
WISCONSIN : COUNTY COURT : MILWAUKEE
COUNTY

ED MARGIS PLUMBING &
HEATING CO., INC.,

Plaintiff ORDER FOR JUDGMENT
 -vs-
 Case #C-4203
 SYDNEY M. EISENBERG
 Defendant

The respective motions after verdict of the plaintiff and the defendant having come on to be heard on October 29, 1975 at 9:00 o'clock a.m. before that Branch of the County Court of Milwaukee County presided over by the Honorable J. Callahan; at which time the plaintiff appeared by its attorney Francis X. Krembs and the defendant appeared by his attorneys, Eisenberg & Kletzke, represented by Sydney M. Eisenberg; and after hearing the arguments of counsel and being fully informed and advised in the premises;

NOW, upon all the records and files herein and proceedings had thereon, and on motion of Francis X. Krembs, attorney for the Plaintiff,

IT IS ORDERED:

That the motions after verdict of the defendant, be and the same are hereby denied.

IT IS FURTHER ORDERED: that Judgment be entered herein in favor of the plaintiff, Ed Margis Plumbing & Heating Co., Inc. and against

the defendant, Sydney M. Eisenberg in the amount of \$3,279.71 together with interest computed thereon from May 13, 1969, and dismissing the Counter-claim of the defendant on its merits together with costs and disbursements to be taxed herein by the Clerk.

Dated at Milwaukee, Wisconsin, this 29th day of October, 1975.

BY THE COURT:

/S/ J. Callahan
 County Judge

STATE OF
WISCONSIN : COUNTY COURT : MILWAUKEE
COUNTY

ED MARGIS PLUMBING &
HEATING CO., INC.

Plaintiff
-vs-
SYDNEY M. EISENBERG
Defendant

JUDGMENT

Case #C-4203

The above entitled action having been tried to a jury before that Branch of the County Court of Milwaukee County presided over by the Honorable J. K. Callahan on the 13th, 14th and 15th days of October, 1975, and the said jury have rendered its special verdict on October 15, 1975, in favor of the plaintiff and against the defendant, which special verdict is on file herein and is hereby incorporated by reference, and the Court having ordered judgment in accordance with said verdict,

NOW, on motion of Francis X. Krembs, attorney for Plaintiff,

IT IS ORDERED AND ADJUDGED:

1. That the plaintiff, Ed Margis Plumbing & Heating Co., Inc. recover from the defendant, Sydney M. Eisenberg, the sum of \$3,279.71 with interest in the amount of \$902.13 computed thereon from May 13, 1969 together with the sum of \$219.64, being the costs and disbursements taxed herein.

2. That the Counterclaim of the defendant be and is hereby dismissed on its merits.

Dated this 19th day of November, 1975.

BY THE COURT

FRANCIS X. McCORMACK, Clerk

By: /s/ Dorothy Slawyk
Deputy Clerk

Judgment entered this 19th day of November, 1975
at 2:45 o'clock p.m.

FRANCIS X. McCORMACK, Clerk

By: /s/ Dorothy Slawyk
Deputy Clerk

No. 75-581

August Term, 1977

STATE OF WISCONSIN : IN SUPREME COURT

Ed Margis Plumbing and Heating
Company, Inc.,

Respondent,

v.

Sydney M. Eisenberg,

Appellant.

APPEAL from a judgment of the county court of
Milwaukee county: JOHN K. CALLAHAN, Judge.
Judgment affirmed.

PER CURIAM. The action was based on a contract allegedly entered into by the Ed Margis Plumbing and Heating Company, Inc. and Sydney M. Eisenberg. The Company installed pipe in the boiler room of an apartment building owned by Eisenberg pursuant to an alleged oral contract between Richard Margis, representing the Company, and Fred Hornbach, Eisenberg's property manager, charges for work to be made on a time and materials basis. Eisenberg claims that Hornbach had no authority to contract for him and denied the existence of any agreement with the Company. Further, Eisenberg entered a counterclaim alleging that the installation of the pipes had caused him considerable loss because the installation had been done in a manner which interfered with his plans to relocate the water heaters and convert the boiler room into an apartment.

The action was initiated April 16, 1970. The trial date was postponed several times and two mistrials were granted. The third trial proceeded to judgment which was entered November 29, 1975.

The following issues are presented in this appeal:

1. Is a corporation which was an active business operation at the time suit was initiated barred from maintaining the suit if its current annual reports have not been filed with the Secretary of State at the time of trial?
2. Did the trial court err in limiting cross-examination of a witness to the scope of the direct examination?
3. Did the trial court err in sustaining an objection on the ground that the witness was in-

competent when no ground of incompetency was stated?

4. Did the trial court err in sustaining objections on the ground that the question sought "immaterial and irrelevant" information because such objections lack sufficient specificity?

5. Did the trial court exclude, without basis in reason or law as Eisenberg contends, virtually all of the evidence necessary to support Eisenberg's case and counterclaim?

6. Did the trial court err in refusing Eisenberg's request to record the closing arguments?

7. Did the trial court err in several instructions?

8. Was Eisenberg denied a fair hearing because the trial court was biased against him?

Corporation's Capacity to Sue

Ed Margis Plumbing and Heating Company, Inc. was a family-run operation. The Margis brothers managed the business after their father's death in 1968. There was evidence that the corporation stopped doing business in November, 1970, but there was no evidence that its corporate existence was terminated. There was evidence that the corporation had failed to file its annual report with the Secretary of State as required by law.

A corporation which has not filed an annual report with the Secretary of State within a year of each calendar year's end is not in good standing. Sec 180.793(3), Stats. The statutes do not provide that a corporation which is not in

good standing is barred from prosecuting a suit.

Eisenberg argues that failure to file an annual report results in a "technical dissolution" since the attorney general may commence an action seeking a decree of a circuit court involuntarily dissolving a corporation which does not file an annual report. Sec. 180.769(1)(a), Stats. This argument is specious. The attorney general initiated no such action against the Company. Indeed, even if he had, the dissolution of a corporation does not take away or impair any remedy available to a corporation for a claim existing prior to the dissolution if such action is commenced within two years after the date of dissolution. Sec. 180.787, Stats. We conclude the Company did not lack capacity to maintain the suit. Sec. 180.04(2), Stats.

Scope of Cross Examination

Eisenberg correctly asserts that the trial court erred in ruling that cross-examination must be limited to the scope of the direct examination of the witness. Boller v. Cofrances, 42 Wis.2d 170, 166 N.W.2d 129 (1969). However, Eisenberg failed to preserve this issue for review. He included the assignment of error in his motions after verdict, but he made no offer of proof regarding the answer anticipated. Bellinder v. State, 69 Wis.2d 499, 506, 230 N.W.2d 770 (1975); Findorff v. Findorff, 3 Wis.2d 215, 226, 88 N.W. 327 (1958).

The question which provoked the objection and ruling was the following: "When did you first find out that the defendant was very unhappy and discouraged with what had taken place?" The witness had testified that she personally did not know anything about the transaction leading to

the suit. Her only basis for answering the question objected to, which concerned an aspect of that transaction, would have been information obtained from others, presumably, from her son.

Since the son later testified on the same point, it is probable on the basis of the existing record that nothing of substance was lost by the error. The question was answered, and the information sought by the question was given to the jury.

Competency of Witness

Eisenberg correctly asserts that the trial court erred in sustaining an objection to a question asked of Hornbach, the property manager, on the ground that Hornbach was incompetent to answer. The question concerned the contents of a letter written by Hornbach.

Every person is competent to be a witness except one prohibited by the rules. See sec. 906.01, Stats. No exception seemed to apply to Hornbach. Here again, no offer of proof was made by Eisenberg so the error was not properly preserved for this court. Bellinder, Findorff, supra. Nevertheless, on the basis of the record, the error could not have been prejudicial to Eisenberg. The question objected to had already been asked of the witness in a slightly different form and answered by him.

Sufficiency of "Immaterial and Irrelevant" Objection

Eisenberg asserts that the trial court erred repeatedly in sustaining objections made on the ground that the information sought was "irrelevant and immaterial." Eisenberg claims that an objection must be made on specific grounds. Eisenberg

in his brief says "There are literally hundreds of examples of this lack of specificity in . . . objections."

The general rule is that objections should be specific. However, when evidence is excluded upon a general objection, the ruling will be upheld on appeal if there is any ground to sustain the exclusion. Our court has also indicated that in the absence of any request by the opposing party or the court to make the objection more definite, it will be assumed that the objection was understood and the ruling placed on the correct ground. See Colburn v. Chicago, St. Paul, Minneapolis & Omaha Ry., 109 Wis. 377, 382, 85 N.W. 354 (1901); Rosenberg v. Sheahan, 148 Wis. 92, 95-96, 133 N.W. 645 (1912); State v. Hoffman, 240 Wis. 142, 152, 2 N.W.2d 707 (1942); Boardman, Offer, Objection and Preservation of Error, 1945 Wis. L. Rev. 222, 225-227. On trial, Eisenberg did not ask that the objections be made more specific. Eisenberg contends that the multitude of those objections which were sustained "fly . . . in the face of justice and fair play." We have carefully read the record and do not believe the judgment should be reversed in the interest of justice.

Unreasonable Exclusion of Evidence Supporting Defendant's Case

In addition to the alleged errors in evidentiary rulings already discussed, Eisenberg makes a general assertion that the trial court abused its discretion by excluding virtually all the evidence necessary to his defense and counter-claim through rulings which had no basis in reason and law. The record does not support Eisenberg's characterization of the trial.

Eisenberg testified at length in his own behalf and produced several witnesses who were examined regarding the issues he raised as to agency and damages. An examination of the facts encompassed by Eisenberg's offers of proof shows that virtually all of the evidence claimed to have been improperly excluded was part of the record. The only subject upon which no evidence was admitted related to the practice of the plumbing industry regarding written contracts and Eisenberg's general policy regarding written contracts. Eisenberg attempted to introduce evidence on these subjects at several points in the trial. Without deciding whether any ruling which excluded evidence on those subjects was erroneous, we note that, even if all or some of the rulings were erroneous, "not all errors at trial mandate a reversal. Trial error is prejudicial only when it reasonably could be expected to affect the outcome of the case. The general rule that this court follows is that it will not reverse for error unless it appears probable from the entire evidence that the result would have been different had the error not occurred." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 264, 208 N.W.2d 148 (1973). The jury heard evidence relating to the transaction in issue; it is not probable that a different conclusion would have been reached if the jury heard evidence on general industry practice or Eisenberg's own past dealings.

Refusal to Record Closing Arguments

The trial court erred in not recording the closing statements of counsel. Sec. 256.55(3), Stats. provides:

"(3) Voir dire examinations in any civil or criminal action need not be reported unless

ordered by the court. Opening statements and closing arguments shall be reported in any action upon request of a party or upon order of the court. A request to report opening or closing argument shall be made on the record before any such argument has commenced."

Eisenberg did request that a record be made; he objected to counsel's closing argument; and he renewed the request for a record at the time of objection to the argument. However, even if the closing argument had been recorded, Eisenberg would not now be able to raise any objections. Eisenberg failed to move for a mistrial on the basis of counsel's argument before the verdict was returned. Nietfeldt v. American Mut. Liability Ins. Co., 67 Wis.2d 79, 89, 226 N.W.2d 418 (1975); Zweifel v. Milwaukee Automobile Mut. Ins. Co., 28 Wis.2d 249, 137 N.W.2d 6 (1965). While the jury was deliberating, Eisenberg asked that the record reflect his original request that closing statements be recorded; that motion was not sufficient to preserve an objection to an erroneous closing statement.

Jury Instructions

Eisenberg asserts that three of the jury instructions were erroneous. The instructions objected to related to the principal-agent relationship and the measure of damages--quantum meruit and the loss of future profits.

The agency instruction was not inadequate or slanted against Eisenberg. The instruction given was similar to the standard instruction on agency. See Wis. J I Civil 4000. The language in the instruction given (but not in the standard instruction) advised the jury that even though there

was a prior principal-agent relationship their task was to determine whether a principal-agent relationship existed for the contract in question. We believe the instruction was favorable to Eisenberg.

Eisenberg argues that the jury should not have been instructed on "quantum meruit" because the complaint was based on an alleged contract. Eisenberg is correct in contending that where a plaintiff claims to have performed the contract the measure of damages is the stipulated contract price, not quantum meruit. Roszina v. Nemeth, 251 Wis. 62, 67, 27 N.W.2d 886 (1947); Estate of Andrus, 178 Wis. 358, 362, 190 N.W. 83 (1922).

However in this case the alleged contract terms were that the work be paid for on a time and materials basis. The court's instruction was that if the jury found the Company had in good faith rendered services to Eisenberg, it should award the Company the reasonable value of the services. This language is substantially equivalent to instructing the jury to award damages on a time and materials basis. Damages under the terms of the contract or under the quantum meruit theory as described in the instruction are substantially the same in this case.

Eisenberg does not contend that the content of the instruction on future profits was erroneous. He contends that the instruction was inappropriate because he asked for profits lost between the time the pipes were installed and the trial, not for profits lost for the indefinite future because of the defective work. On the basis of Eisenberg's counterclaim and the record, we believe the instruction was proper. If Eisenberg wanted an additional instruction

relating to other measures of damages, he failed to request such an instruction.

Trial Court's Bias

According to Eisenberg, the trial court displayed a bias against him which resulted in his being denied a fair hearing. We do not agree. Eisenberg and Michael Hupy were counsel for Eisenberg.

The record indicates that sharp words were exchanged among all the participants in the trial. However, the trial court was careful to clarify for the jury an ambiguous statement it made which might otherwise have been misunderstood as a negative comment on Eisenberg. Further, in the general instructions, the court instructed the jury to disregard completely anything it had said which might have suggested the court had a feeling one way or the other in the case. In our opinion, the trial court's instruction corrected any possible error.

Eisenberg also asserts the trial court indicated prejudice by summarily denying his motion to dismiss and his motion for non-suit. Although the trial court initially declined to hear the grounds for the motions, it later did hear a long statement on the grounds of the motions before denying the motions. Eisenberg's contention on this point is therefore baseless.

During the trial, Eisenberg remarked that he intended to file an affidavit of prejudice under sec. 261.08(1), Stats. He believes the court indicated bias against him when it remarked that it would do him no good to do so. The court's remark was simply an accurate statement of the

law. An affidavit of prejudice requesting substitution of judges must be filed within ten days after a case is noticed for trial. Sec. 261.08(1), Stats. It would not further the administration of justice if a party could request a change of judge after jury trial had begun. See Pure Milk Products Coop. v. NFO, 64 Wis.2d 241, 247, 219 N.W.2d 564 (1974).

For the reasons set forth above, the judgment is affirmed.

Office of the Clerk

SUPREME COURT

State of Wisconsin

Robert O. Uehling
Clerk

Madison, January 8, 1978

To Francis X. Krembs, Milwaukee
Eisenberg & Kletzke, Milwaukee

The Court today announced decision in your case as follows:

ED MARGIS PLUMBING AND HEATING CO., INC.
v. SYDNEY M. EISENBERG,
#75-581

MOTION FOR REHEARING DENIED WITH COSTS.

Respectfully yours,

ROBERT O. UEHLING

Clerk of Supreme Court

INITIAL STATEMENTS

233

Mr. Hupy:

Section 180.04 of the Statutes of the State of Wisconsin lists all general powers of the corporations incorporated in this State. Subsection (2) of that section states that a corporation has the power to sue and being sued in its corporate name. Now, Section 180.79(3) deals with filing an annual report of a domestic corporation. Subsection (3) of that Statute states that if said report is not filed by the following January 1st the corporation shall not be in good standing. We checked with Madison, Judge, and the plaintiff corporation is not at this time in good standing. The Secretary of State also advises us they have not heard from the corporation since 1972. I don't think if the corporation is not in good standing it has the power under 180.73(2) to sue. I don't think the corporation can sue. We would ask the Court to bar the plaintiff corporation from proceeding in the trial of this action.

COURT:

I looked at the complaint which is on file and subscribed to on the 10th day of April, 1970. The motion is denied.

MR. EISENBERG:

May we have permission to review the motion with some authority?

COURT:

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You have the right during the trial to make the motion.

MR. EISENBERG:

We will have some authority and have some proof that the corporation is not in good standing at this time. I have a motion. I have a motion. The motion is to strike the reply for the reason that the answer and counterclaim was filed on May 4, 1970. It was served on Francis Krembs April 21, 1970.

COURT:

What was?

MR. EISENBERG:

The answer and counterclaim served April 21, 1970. There is no extension of time by the Court. Reply was filed on June 26, 1970 without any copy to us where there was a reply.

COURT:

What do you say?

MR. KREMBS:

That reply had been served upon the Defendant and had been filed in this action. Further this matter had been brought on for trial on two different occasions. We proceeded into trial based upon all the issues raised, not only in the complaint, but in the counterclaim as well, and issue was joined to both parties' pleadings. I think the Court will take into consideration this motion now made is not properly predicated upon any actual facts, and furthermore, whatever complaint the defendant might have had was waived by his proceeding to trial on two previous occasions.

MR. EISENBERG:

235 I don't know what counsel is talking about. We never got beyond an opening statement in the previous case as I understand it, and as I remember it, and I at all times intend to move for judgment on the counterclaim. I thought I would alert the Court ahead of time.

COURT:

You made your record, Mr. Eisenberg, your motion is denied.

MR. KREMBS:

Merely for the sake of the record by examination of the file I discovered the affidavit I was looking for; that reply was served upon the defendant by mail as shown in my affidavit of mailing dated June 25, 1970, and it is to the effect that the reply was mailed to the defendant on May 6, 1970 and that is of record.

MR. EISENBERG:

If the Court please, we never got any, it was filed in Court on that date. Your Honor can see there is no affidavit attached to it; secondly, I still don't have a copy, and, thirdly, he was late anyway.

COURT:

You have made your record for the Supreme Court. Your motion is denied. I am going to try this lawsuit today.

* * * * *

DIRECT EXAMINATION OF ALMA MARGIS, BY MR. KREMBS:

246 My name is Alma Margis, I live at 5011 North Palisades Road. I am familiar with Ed Margis Plumbing & Heating Co., Inc. My husband, Ed Margis, organized that corporation to engage in the business of plumbing and heating. That corporation was doing business in 1967, 1968, and 1969. My husband died on January 7, 1968. Up to that time the actual plumbing work was done by my sons, Edward and Richard Margis, who also were active in the corporate business. There were no stockholders in this corporation, it being just a family affair. No one other than the immediate Margis family had an interest in the corporation.

After the death of my husband, the business continued with Ed Margis, a master plumber, being in charge of the business. He was accompanied by his brother, Richard and Arthur. They continued to operate through November of 1970, after which the plaintiff corporation ceased to do business.

CROSS-EXAMINATION OF ALMA MARGIS, BY MR. EISENBERG:

I have no specific knowledge of the facts of this lawsuit. I found nothing in the files and I had nothing to do with the business of the plaintiff corporation.

MR. EISENBERG:

When did you first find out that the defendant was very unhappy and discouraged with what had taken place?

MR. KREMBS:

I object to the form of the question. It is

too general to the topic and no reference to time.

COURT:

Sustained. It has nothing to do with the facts of cross-examination. That question was not brought out on the original questioning.

MR. EISENBERG:

Is the Court's ruling that cross-examination can't extend beyond the direct examination based on the Supreme Court's interpretation of the evidence?

COURT:

Yes.

ALMA MARGIS:

The company was dissolved in November of 1970. Arthur, my son, was involved in the business. He is still alive but is not working for us.

249

DIRECT EXAMINATION OF OSWALD CLUDIUS, BY MR. KREMBS:

My name is Oswal Cludius, and I reside at 2641 South 30th Street. I am Assistant Superintendent Plumbing Inspector for the City of Milwaukee. I have held that position for 16 years.

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In 1969 my duties consisted of supervising plumbing inspection records. (Plaintiff's exhibits 1, 2 and 3, marked for identification). I was subpoenaed to appear this morning and bring certain records of 803-813 East Wells Street from 1969. I have these records with me.

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Plaintiff's exhibits 1 and 2 are receipts for a permit taken out by the plumbing inspector's office. They were issued by the Plumbing Inspector's office, City of Milwaukee. The premises identified in these exhibits are those of 803 and 813 East Wells. They were issued to Ed Margis Plumbing & Heating Co., Inc. for the purpose of installing two gas water heaters. Plaintiff's exhibit 3 I can identify. It does bear my signature, and it is retained by me as part of my duties as assistant superintendent plumbing inspector. Exhibit 3 relates to the installation of water heaters at 803-813 East Wells Street. It was made following an inspection by the bureau which it refers to.

CROSS-EXAMINATION OF OSWALD CLUDIUS, BY MR. EISENBERG:

I don't remember that job in 1969 and I don't remember the building, as I was not the inspector of the building.

MR. EISENBERG:

And with reference to the City of Milwaukee Building Inspectors Division, do you know of any reason why the gas heaters couldn't have been installed on the opposite wall where the gas regulator was stationed, rather than run it all the way across to the other side of the building?

MR. KREMBS:

I will object, no proper foundation laid.

MR. EISENBERG:

I stipulated he is qualified.

COURT:

Objection sustained.

MR. EISENBERG:

I will ask you as a City Building Inspector for the plumbing department in your capacity, can you think of any reason under the sun why two gas heaters should be run to the opposite side of the building where the gas regulator had already been brought into the building?

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MR. KREMBS:

Objection, no proper foundation made, calling for speculation.

COURT:

Objection sustained.

MR. EISENBERG:

Mr. Cladius, would you say it is common sense to run gas lines all across a building and put hot water heaters on the opposite side and come up with a bill of better than three thousand dollars?

MR. KREMBS:

Same objection.

COURT:

Objection sustained.

MR. EISENBERG:

I am expressing it to the Judge.

COURT:

The Court hears you very well.

MR. EISENBERG:

That is all.

DIRECT EXAMINATION OF RICHARD MARGIS, BY MR. KREMBS:

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My name is Richard Margis, and I reside at Cedar Edge, Iowa. Prior to that, I resided at Fredonia, Wisconsin. I was affiliated with Ed Margis Plumbing & Heating Co., Inc., from 1961 through 1969. In 1967 and 1969 I worked there as a journeyman plumber and estimator. My duties included going out in the field and giving prices on work to be done, giving advice in the field to anyone who wanted to remodel a kitchen or bathroom, any pipes that were involved, also to bill out and to oversee any billings that were to be made as far as statements and invoices.

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I am familiar with the job at 803-813 East Wells Street, and I am familiar with the work that was performed there. I had been contacted to do work there in January or February, 1969. That contact was made by Fred Hornbach, who is the property manager for Laneil Property Management Company. That is a corporation run by Sydney Eisenberg. Mr. Hornbach had contacted me before with reference to other work. When Mr. Hornbach contacted me, he stated he was calling for Laneil Management Company.

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In the course of this conversation, Mr. Hornbach stated that he wanted me to look at some work at 803-813 East Wells Street, pertaining to the installation of day and night heaters in the buildings. He also wanted to meet me on the job, which was done in the latter part of January or early February of 1969. At that time, Mr. Hornbach, the building janitor or superintendent, and myself met in the lobby of 803-813 East Wells.

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At this time I was taken into the back of the building and shown where the heaters were to be placed by Mr. Hornbach, who also wanted me to give him a price on the installation of the furnace. At that time Mr. Hornbach indicated we were to install the gas pipes and hook the hot, cold, and return lines to the water heaters. We also were to run the gas line for two heating boilers to be installed by others. No drawings were furnished at this meeting. The meeting lasted about a half hour to forty-five minutes. At the close I told Mr. Honrbach that I couldn't give him a firm estimate on the piping, the only way we could take the job would be on a time and material basis. In response to this statement, Mr. Hornbach said he would check and get back to me.

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He did contact me a week or two later, by telephone to our office, and said he had an Okay on the work and we should proceed with the piping. After this conversation we applied for a permit for the job. The permits are exhibit 1 and 2. I then took the men over, showed them what was to be done, and that they could proceed with the work. When we went there, the only person present was the janitor, who let us in. This transaction occurred in the middle of February. The men on the job were my brother, Edward, Wayne M. Hammer, and Ed Morowski.

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Later on in the job we were again contacted by Fred Hornbach, on the telephone. This was made in the beginning of March. At that time he told us to pull off the job. At this time Mr. Hornbach said nothing about the work, only that he would get back to us and let us know when we could get back on the job. He did not explain what the problem was. At this time I pulled the men off the job.

I was again contacted by Mr. Hornbach in the latter part of March, 1969, again by telephone. At that time he said everything was all right and to proceed with the work. I therefore sent the same crew of men back on the job.

At this time I maintained all books and records of the corporation with the reference to jobs that were being done. I recognize plaintiff's exhibit 4 as part of these books and records. The job slips included therein appear to be in my brother's handwriting. It was customary, in February and March of 1969, to have the men on the job prepare the job tickets. I recognize plaintiff's exhibit 5 as an invoice addressed to Laneil Management Company. That invoice was prepared in the usual course of maintaining the books and records of the plaintiff corporation at that time. That invoice was prepared under my supervision and direction, and the original was sent to the defendant. I can identify plaintiff's exhibit 6 as an invoice dated May 13, 1969, addressed to Laneil Management Company from Ed Margis Plumbing & Heating. This invoice was issued under my direction and was done in conformity to the procedures adhered to by the corporation at that time. The work referred to in exhibit 5 relates to the installation previously discussed with Mr. Hornbach.

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In my opinion, the work set forth in exhibit 5 was necessary in accomplishing the end that I had discussed with Mr. Hornbach. As estimator for the plaintiff corporation, I familiarized myself with the prices prevailing in this community during January, February, March, and April of 1969. The charges set forth in plaintiff's exhibit 5 conform to those prevailing in this community at that time.

After the date of the invoice, May 6, 1968, Mr. Hornbach again contacted me by telephone. At that time he stated that Mr. Eisenberg wanted to see me on this bill, and also requested an itemized bill. With reference to this itemization, he stated he wanted a breakdown on the labor and the material. Therafter we sent such an itemization. Exhibit 6 is the statement I am referring to. That exhibit is dated May 13, 1969. Shortly after we sent exhibits 5 and 6 we met with Mr. Eisenberg, at his office. Mr. Eisenberg, Mr. Hornbach, a representative from Iron Fireman, and myself attended this meeting. At that meeting, Mr. Eisenberg said he wanted me to take a cut on the bill of about half. I told him I would not cut it in half and that was the end of the meeting. Other than requesting the bill and the itemization, Mr. Eisenberg and Mr. Hornbach made no reference to the work covered in exhibits 5 and 6.

CROSS-EXAMINATION OF ED MARGIS, BY MR. EISENBERG:

At the time I came to the office I was not told that I had no authority to make the changes. I have been sworn to tell the truth. Somewhere in January or the beginning of February, 1969 was the first I knew about the job on Wells Street. I was not a stockholder of Ed Margis Plumbing & Heating Company, and am not now. At the time I

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was in Mr. Eisenberg's office he did not tell me, to the best of my knowledge, that I had no business getting a plumbing permit, that all arrangements would be made with Iron Fireman. I did not see the contract with Iron Fireman providing that they would get the permit. He did not mention to me that he was very unhappy about running pipe across the hall. I had no idea why we were stopped and told to get off the job. I was told to get off the job once. I did not work on the job myself. I do not know how many times the janitor or Mr. Hornbach told us to get off the job. I never got a personal order from anybody to go ahead with this job. At the time I was in Mr. Eisenberg's office I was not told that nothing could be given out of that office without a purchase order. The only thing I was told in Mr. Eisenberg's office was that the bill was too high, cut it in half. There was a man from Iron Fireman there, and Mr. Hornbach came into the office with me. I do not know what Mr. Eisenberg's temperaments are, any time someone wants to cut a bill in half they are not happy.

I don't have any written contract with anybody to do work on these buildings for any amount. No one gave me a work plan to show me what was to be done. I was not a master plumber at the time Mr. Hornbach called me in January of 1969. It is not a matter of fact that my mother was running the company. I do remember being put under oath on February 21, 1973, and being questioned by a Mr. Pogodzinski. I gave these answers to questions put to me. "Were you running the office for Ed Margis Plumbing & Heating Co. at that time?"

Answer: I was a plumber and estimator at that time." Question: "Who was running the office?" Answer: My mother."

It is not a fact that I was contacted only once by Mr. Hornbach. I was asked the following questions, and gave the following answers, under oath.

QUESTION: "Did you meet with him," referring to Hornbach, "regarding this telephone conversation?"

ANSWER: "Yes."

QUESTION: "Where did you meet with him?"

ANSWER: "At the building in question."

QUESTION: "When did you meet with him?"

ANSWER: "I couldn't remember."

QUESTION: "Was it in January, or, say in February, or in March?"

ANSWER: "It was either the latter part of January or February."

QUESTION: "Do you know who arranged the meeting?"

ANSWER: "Fred Hornbach."

QUESTION: "Did he call you more than once?"

ANSWER: "No."

278 When I met with Fred Hornbach in the lobby, all he asked me for was a price. He did not tell me to go ahead at that time. I didn't give him a price at that time. I had seen Mr. Hornbach before that day. The next time I saw him was at the meeting in Mr. Eisenberg's office. I did not see him between these times. I myself did

not send any billings that were prepared. I prepared them but the office girl sends them out.

279 Fred Hornbach did not sign anything pertaining to this job with reference to his dealing and discussions with me. I knew Fred Hornbach did not own the property.

280 Our employees went in and did this work. They turn in weekly time cards, which I don't have with me. They were apparently lost when the business closed. They were not thrown away. I knew this case was coming up for quite a while. The original records were sent to Mr. Eisenberg, not the time cards, but exhibits 5 and 6.

281 I sent a bill, marked exhibit 5, to Laneil Management, and I've heard Mr. Eisenberg say he received it. I also sent the bill marked exhibit 6 to Laneil Management Company. There were no other bills sent to Laneil.

282 The portion of the bill that says "Material charged, \$1338.21," covers a list of materials on the previous bill. I believe the diameter of the pipe was 3". It's been four, five years ago. About 50 ft. of 3" pipe was laid. There is no price listed on the bill for anything other than service and material total. That is the way we usually did it, unless they require, as Mr. Eisenberg did, a breakdown. Mr. Eisenberg requested a breakdown of labor and material. One could not tell the price per foot of 3" pipe from his bill, as he didn't request it. I could not say what was charged for the nipples. I could not say how much went to the unions.

283 The bill reads: "Two 3/4" hammers, brass nails, then 72 ft. of 2" galvanized steel pipe,

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then 8 ft. of 2" galvanized unions, 5 2" galvanized T's, 4 2" by 1-1/2" galvanized T's, then 1 2" and 1-1/2" galvanized T." The 2" pipe was used for water, 3" is used for gas. When I have 2" and 1-1/2" galvanized T, that is not what I put on, 3, but I put on 2. The plumbing permit costs \$2.00, I needed two, for a total cost of \$4.00.

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In the itemization I have indicated the numbers of the various items, but nowhere have I stated what the price was on any of them. We were asked for a breakdown on material and labor. A material charge of \$1,338.21 is listed, and that covers all materials. It was charged at the fair market price at that time. I don't recall what the price of the 1 2" by 1/4 hex bushing cost; it was four, five years ago. Everything is simply lumped together in one figure. That was the way Mr. Eisenberg requested it.

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There are several ways to transact business in this community. You could do it by written contract or verbally. We dealt with Mr. Hornbach verbally. Other jobs done with Mr. Eisenberg include a job on Marshall Street and on Commerce Street. I don't recall if there were written contracts for these jobs. It is common practice to do work without written contracts. An arrangement like this could be worked out with attorneys, since I trust attorneys on their word, and they trust me on mine. I did not know Mr. Eisenberg's company had their own people on the payroll for heating. I don't deny that I was told by Mr. Eisenberg that they had put the gas pipes in themselves.

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I knew Mr. Hornbach on sight, because I had met him before. I was asked on that previous occasion to get a roto-rooter and to make minor repairs on the building, such as fixing leaks. This is to my memory, but it has been quite some time. I have no idea if Mr. Eisenberg's firm used other plumbing firms than ours on occasion.

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Mr. Hornbach, on occasion, told me to hold up, then to start again. The exact dates of this I couldn't tell, but it was in 1969. I made no notes or entries pertaining to this, I merely had a verbal okay on it. I am sure it was Fred Hornbach who gave me the go ahead on the telephone although the date I don't know, it was sometime in March. I believe there was a delay in the work on March 4th or so it must have been around that date. Plaintiffs Exhibit 4 was not shown to Mr. Eisenberg before today. The top page of Exhibit 4 was made out when the job was progressing. My brother's handwriting appears on the front cover in ink and is also in pencil. I never made out any part of the front page except the heading. I can't type, but it was made under my supervision, as was Exhibits 5 and 6. Exhibit 4 was in my records from the time I received it. As I stated both records, in reference to the headings were made under my supervision even though someone else made the entries on them.

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The address Exhibit 5 was sent to was Laneil Management, 1131 West State Street, Milwaukee, Wisconsin 53233. Exhibit 4 was made out to Laneil Management, 803 East Wells, Milwaukee, Wisconsin. On Exhibit 4 it is spelled L-A-N-I-E-L. On Exhibit 5 it is L-A-N-E-I-L. Both were made under my supervision.

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As to the gas pipe line, the Gas Company set the meters and someone else completed the gas line,

outside of my company. We ran the line up to a certain point. From that point, it would be up to the installers of the boiler to connect on to it. Our company hooked up the heaters though I, myself, did not do it. I knew these circumstances, however, because I had trusted men on the job and I took their word for it. I do remember the following questions being asked of me under oath.

Question: "Were those the only people to do work on the job?" Answer: "From our company, yes."

Question: "Did somebody from some other company do some work on it, do you know?" Answer: "Whatever else he had done was done by another company, not ours." Question: "You, yourself, didn't do any of the work on it?" Answer: "No."

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As to the time cards, I left the business before the business was closed down. I was asked the following under oath and gave the following answers. Question: "Now, did your brother and these two other men, did they keep time cards of the time they spent on this particular job?"

Answer: "Yes, they kept track of all the time spent on the job." Question: "Do you have the time records in your possession?" Answer: "No, I don't?" Question: "Who would have them, if you know?" Answer: "I don't know." Question: "You don't know if your brother, Ed, would have them?" Answer: "No, I don't."

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A material list is kept by the men on the job. One of my men kept it. There was no one person in charge. I have a material list so I know it was kept. It is true that job tickets were usually kept by plumbers as to materials furnished. The job ticket in this case is Exhibit 4. We first found it when we went through the files. I did not have it when I was deposed in 1973. At that time, I didn't know whether it

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was kept or not. I said then I was running the office not that job. My men were running the job. If anyone was in charge, it would have been my brother. I gave the following answers to questions while under oath.

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By Mr. Pogodzinski: "I refer to A-Z through A-5, attached to the Complaint, which apparently lists a number of items that were supposedly put into this job, and I don't see any separate prices on any of those items. "Do you know whether there was a separate list on them?" Answer: "I couldn't tell you that if there was or not any more." Question: "Would somebody in the office have sent a separate list?" Answer: "I wouldn't know." Question: "Do you know how the \$1,338.21 for materials was arrived at?" Answer: "Through a material list made out on the job." Question: "Do you know whether there was such a material list in existence at this time?" Answer: "I couldn't answer that." Question: "Who would have kept the material list, if you know?" Answer: "I don't know who would have kept it." Question: "Now, of the three men that were allegedly on this job, which of the three would have been in charge of the job, if you know?" Answer: "I would say there would have been no one in charge, they worked as a unit." Question: "Would anyone of the three have kept a material list?" Answer: "I don't know, someone would have kept it." Question: "On what type of form would it have been kept?" Answer: "A job ticket." Question: "But you don't know where that job ticket is, though, do you?" Answer: "No." Question: "Would any of the three men have been authorized to make entries on the job ticket?" Answer: "Yes." Question: "But you don't know whether or not they were actually put into place, do you?" Answer: "All I can say is that they wouldn't be listed if

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they were not used." Question: "You weren't there though when those things were put in, right?" Answer: "No." Question: "Do you know who compiled Exhibits A-1 through A-5?" Answer: "Do you mean the original lists?" Question: "Do you know if that was drawn up at your company or who did that?" Answer: "The list of materials?" Question: "The whole thing, all of that Exhibit, the original of it?" Answer: "The list of materials was drawn up by the men, what they used on the job." Question: "But, what I'm trying to get at, who drew up these papers that are right in front of you?" Mr. Krembs: "He's talking about Exhibits A-1 through A-5." Answer: "That would be the office girl." Question: "Would there have been a rough draft or something written out by someone?" Answer: "Only from the original job ticket." Question: "Was it procedure to destroy the original ticket after this type of thing was made up, or did you keep those?" Answer: "Sometimes they were destroyed, other times we kept them." Question: "In this case, you don't know whether or not the original job ticket was destroyed or if it was preserved?" Answer: "Yes, I wouldn't say destroyed, I would say lost." Question: "Do you know whether it exists at this time?" Answer: "No, I don't." Question: "If it does exist your mother would probably have it, right?" Answer: "Yes."

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When Mr. Hornbach told us not to proceed with any work, I told him I would pull off the job, which we did, I didn't think I should go to the owners of the building to find out why we had been pulled off. Mr. Hornbach, I believe, stated that a problem had arisen and we should remove our men from the job. He did not say what the reason for the delay was. I believe our office girl added up the hours that total 155. She did this on her

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adding machine. She double checked her work.

On Exhibit 4 the first line states: February 14 - 7 hours. The next line in pencil has ditto marks, next in pencil is - 4 hours, February 19th. The next - 4 hours. The next line says "Edw." means Ed Morowski. This is all written by my brother. As far as I can tell the work "Wayne" was also written by my brother. From February 20th, it goes forward to February 21st on the same line. I don't know why it doesn't go down as I didn't write it. I do not know why this was not available to me in 1973. I can't explain it.

Exhibit 4 is a partial listing of materials used at 813 East Wells Street. There is a notation thereon that reads authorized by Bob. Bob was the janitor on the job who had control of the premises. That slip was made out at our office. The list of materials was made out by my brother, the part stating authorized by Bob, was typed in by our office girl. Bob is the name of the janitor. The building has twenty apartments, you can't go to each one and have someone let you in. Outside of the list "authorized by Bob", there is no other name on Exhibit 4. These names are listed in the even you have to see someone to get into the premises. Here the doors were locked at all times and the first time we went there, Fred Hornbach had to get the keys from Bob's apartment to let us in. After that initial time, I personally never returned to the premises.

I have no invoices showing what we paid for these items. I took care of all bookkeeping on this job as to ordering and obtaining things from wholesalers. The company had a bookkeeper, I don't know who it was, it was not myself. The company was a family affair.

MR. EISENBERG: I am going to make a motion.

COURT: It isn't going to do you any good.

My mother took care of records. If we had a CPA or anything, it was not my department. I do not know who the bookkeeper was.

315 We went ahead with the work on the basis of a telephone call without any verification in writing. After the call, we did nothing to confirm in writing that we were to do the work. Sydney Eisenberg never gave us any authorization, but his representative did.

316 There were two buildings involved here. The gas regulators were not located at the time. As I recall, there was supposed to be a new installation and the meters were to be set by the Gas Company. All I had was an approximate location. At the time, I didn't know where the gas regulators were. I could estimate and take the job because I knew the approximate location. It would be easy to see where they were if they were installed at the time.

318 As gas regulator is an instrument to reduce pressure from high pressure to lower operating pressure. It is necessary on these buildings because there is high pressure in the gas lines at the mains. To my recollection, the building had individual meters and the larger one was installed on the outside to eliminate all the small meters on the inside. I only had an approximate location of all these meters.

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MR. EISENBERG: Yes, I feel and I believe we should move for a mistrial on the grounds counsel had no right to what he is going to do, what he claims to be highly irregular.

COURT: Your motion for mistrial is absolutely denied. I am going to finish this lawsuit if it is the last thing I do.

DIRECT EXAMINATION OF EDWARD R. MARGIS BY MR. KREMBS:

323 My name is Edward R. Margis and I reside at 3713 North Murray Avenue. My occupation is journeyman plumber. In 1969, I was a master plumber employed by Ed Margis Plumbing and Heating Co., Inc. I am familiar with the job done at 803-813 East Wells Street as I was on that job. I was sent there by my brother, Richard. I was accompanied by two other journeymen plumbers, Ed Morowski and Wayne Hammer.

324 I made entries on the job ticket marked Exhibit 4 as to time and material; the price listings were made by my brother. Exhibit 4 does set forth by date the period of time during which I worked on the premises of 803-813 East Wells Street. I first came on the job on February 14, 1969. We were admitted by the janitor, Bob.

325 Bob followed us to the boiler room in the rear of the building. In the boiler room were situated two heaters, two in each boiler room, and he showed us where to locate these heaters for installation. Later, he approved the location. We were told to connect the heaters with the gas and the hot and cold water lines plus one boiler we were to pipe the gas pipe over and drop it down to the approximate location of the gas burners on each boiler. He showed us where

the gas supply was. It was located through the wall of the building and showed us where to place the heaters. He said we should start the installation. We then started, that day, to proceed with the installation.

327 The next day we again returned to the premises and we were allowed in by the janitor, Bob. We all identified ourselves by the patch on our shirts, that plainly identified the company name. The uniforms were green, the writing was in gold, it read Ed Margis Plumbing and Heating Co., Inc., it showed up quite well. We wore this identification at all times we were on the premises. We also had a truck at the premises, that too was identified. The truck was a yellow panel truck that had a sign approximately five feet by two feet which bore the company name, address and phone number.

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MR. EISENBERG: I am going to object to this unless there is some indication that the janitor went outside or some company official went outside and saw where the truck was parked in the neighborhood. There has been no identification or foundation laid.

COURT: Objection overruled.

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BY EDWARD MARGIS: While we were on the job, my co-workers and I were ordered off the job by my brother at which time we left the job. We returned to the job again per my brother's subsequent order. From the entries on Exhibit 4, it shows we were ordered off the job on March 4th and on March 28th we returned.

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On the return, on March 28th, we were admitted by the janitor, Bob, and we were wearing the same uniforms as indicated previously. We also drove the truck mentioned before. We parked that

truck approximately twenty feet outside one of the rooms where the work was being done.

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As to Exhibit 4, I prepared the material list and the amount of materials used. I made the entries as the job progressed and checked them upon completion. To the best of my knowledge, the material listed on Exhibit 4 was brought on the job. The entries thereon as hours of labor were also made by me. All of the hours listed were expended on this job for the purpose of installing the materials described on Exhibit 4.

The work was completed on April 8, 1969. During the time from March 28th to April 8th, we were not told by anyone to get off the job. During this time, we did see the janitor, Bob, who in fact, let us in each day or told us the preceding day that the door would be open.

CROSS-EXAMINATION OF EDWARD MARGIS BY MR. EISENBERG:

There were occasions we entered the premises when Bob was not there. I was the person responsible for where the lines went. I made the decision to run the lines from where the gas first came in. I knew there were gas regulators placed on the inside area projecting into a laundry room. It is not a fact that I didn't know there were two buildings, that I thought there was but one. I do recall answering the following questions under oath. Question: "And you don't know whether it was one building, two buildings or three buildings?" Answer: "They were connected together." Question: "And how many buildings were connected together?" Answer: "It depends on what you consider one building or two buildings." Question: "What did you consider it?" Answer: "I considered it one building. I assumed it was

the same owner of both halves."

337 It is two structures connected by an arch or
338 some type of wall made with the same material as
the building. This wall was built previous to our
doing the work. There is an airway between the
two buildings. Defendant's Exhibit 2 is a drawing
I made at the adverse examination I, myself. It
represents the structure of the building, I drew
it to show what this building was that we did the
work in.

340 The job was a plumbing installation with gas
pipes and water pipes. The location of the piping
was fixed somewhat by the location of the heaters
and the gas supply. Two heaters were moved into
position and two were partially crated. We moved
them over under the supervision of the janitor.
341 The janitor supervised the placement of the heat-
ers. The heaters that were in the building were
attached to the heating plant that heats the build-
ing itself. I knew that this heating plant was
ultimately going to be eliminated. I had asked
the janitor why the heaters were being replaced
and he indicated they were to replace the ones
that were operating off the boiler. We placed
the new heaters where the janitor directed us to
place them. He told us to place these heaters in
front of the windows facing Cass Street in one
boiler room.

343 We parked the truck as close to the building
as possible. That was on Cass Street next to the
property. We moved it as it was necessary always
keeping it as close as possible. There was traf-
fic on the streets and parking lots nearby. We
had, however, always managed to find a place, in
fact, we used the same place as often as possible.
I had seen the janitor walk out the back door,

345 look down the walk way, and there our truck was
parked. That was in February or March. I am not
sure of the temperature then. I don't recall the
exact dates. I have never worked for the Holland
Furnace Company.

346 I talked to Fred Hornbach at one time when
we had a job for Laneil Management Company on East
Commerce Street. That job had to do with plumbing
code violations. These are on record with the
Plumbing Department. It is not the truth that I
never talked to Fred Hornbach in my life. I re-
call giving the following answers under oath:
Question: "Do you know a gentlemen by the name
of Fred Hornbach?" Answer: "No, sir." Question:
"You don't know him at all?" Answer: "Not per-
sonally." Question: "And you never met with him
at all?" Answer: "I think I seen someone pointed
out as him on that location. I was never intro-
duced to him." Question: "He had nothing to do
with the supervision of your job, is that correct?"
Answer: "No, the building manager did." These
answers were all given only in connection with
this job.

349 The janitor never claimed to be a plumber,
350 only a janitor. I never made an estimate for
that job. I do not know if Laneil Realty Corpora-
tion owned the heaters or not.

MR. EISENBERG: Do you know who owned them?

MR. KREMBSS: Objection, immaterial and ir-
relevant.

MR. EISENBERG: This is cross-examination of
the lawsuit.

COURT: It is not material anyway. Objection sustained.

MR. EISENBERG: Not material as to who owned the heaters, your Honor?

COURT: Yes.

BY EDWARD MARGIS: When we left the heaters had no vent pipe, they couldn't be operated in that condition. These were to be put in by others. As far as we connected the heaters, it was according to the plumbing code.

COURT: He answered you twice. The hook-up was done by somebody else.

MR. EISENBERG: At this time, I move to strike.

COURT: Motion denied.

MR. EISENBERG: May I finish?

COURT: I know what you are going to say.

BY EDWARD MARGIS: We checked the water in the heaters at this point. I answered the following under oath. Question: "All right, in what manner did you check it?" Answer: "I don't believe we filled the heaters. We weren't responsible for checking the heaters themselves." The final checkout was done by other parties. I recall answering the following under oath. Question: "Do you have any independent recollection how many days you were on that job?" Answer: "No, sir, not at that time." Question: "Could it have been less than a week?" Answer: "I can't recall." Question: "You can't recall one way or the other?" Answer: "No, sir." Question:

"Could it have been as much as a month?" Answer: "I don't remember." I have just seen Exhibit 4, it was not available at the adverse hearing. I don't recall if I had the billing at that time.

In this case, we checked the heaters as far as fit. We couldn't operate the heaters in the condition they were in. As far as we were concerned, our job was finished when we left. As far as I know, my brother was never told by Mr. Eisenberg to take his pipe out of there. He never told me to take the pipe out of there. We did discuss the work when necessary.

I do recall seeing the old heaters in the building. There was one boiler in each half of the building. They were comparatively large as compared to a house boiler but I couldn't tell when they had been put in. I knew there were regulators and meters on each side of the building.

MR. EISENBERG: I will ask you to identify Exhibit 3 and tell us what it is.

MR. KREMBIS: I object, your Honor.

COURT: Objection sustained.

MR. EISENBERG: I will try to comply to your rules.

COURT: Not my rules, as applied to the statute.

MR. EISENBERG: I have it on the back.

COURT: Is someone who took the picture identified?

MR. EISENBERG: May I be heard outside the presence of the jury?

COURT: No, I am not taking argument on that, I ruled.

BY EDWARD MARGIS: I was never a stockholder in Ed Margis Plumbing & Heating Company. The company is still in existence although it has ceased operation. I do not know the exact date I ceased working for the company.

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361 MR. KREMBS: Objection at this time because the question then posed was calling for speculative form.

COURT: Quit arguing. I haven't ruled on this yet. You have a right to go into adverse and ask if he gave those answers and if he says yes.

MR. EISENBERG: I want to object to a question in there.

COURT: You did the same thing. Now, gentlemen, let's not fiddle around, we are not getting anywhere. If this court can help it, we are going to complete this case.

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365 BY EDWARD MARGIS: I do not know what name the building was in. I worked previously for the Laneil Management Company.

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368 REDIRECT EXAMINATION OF EDWARD MARGIS BY MR. KREMBS:

I mentioned before that I entered the premises when the janitor was not there.

370 ADVERSE EXAMINATION OF SYDNEY EISENBERG BY MR. KREMBS:

I am Sydney M. Eisenberg. I live at 3901 North Lake Drive, Shorewood, Milwaukee County.

371 I am an attorney admitted to the practice of law in Wisconsin and a member of the bar. My office address is 1131 West State Street, Milwaukee, Wisconsin. I own the premises at 803-813 East Wells Street, subject to a mortgage. I owned these subject to a mortgage in 1969. I acquired title from Laneil Realty Corporation in 1958.

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374 COURT: I have ruled. Your objection is overruled. That is Number One, and I am asking you, Mr. Eisenberg, don't add anything to the questions. When you were questioning witnesses you said - just answer my question, yes or no. Now you answer the questions accordingly.

375 BY MR. EISENBERG: Exhibit 7 was signed Sydney M. Eisenberg by me.

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378 MR. EISENBERG: If I understand, the question correctly whoever made it out, did not spell my name right.

COURT: That answer may be stricken. Answer whether or not your signature appears on that.

Page of
Record

MR. EISENBERG: It appears to me that my signature - if this is a photostat, and I assume it is -

COURT: The answer may be stricken. You must answer that yes or no.

MR. EISENBERG: This is obviously a copy of something.

COURT: Does your signature appear thereon?

MR. EISENBERG: If your Honor means this is an original, this is not an original signature.

COURT: Your answer is stricken. Do you understand my question? Did you sign that of which you are holding a copy in your hand?

379 MR. EISENBERG: I signed an instrument apparently originally of which this is not, Sydney M. Eisenberg, and I also initialed it "S.M.E." where they tried to put Laneil Management. I tried to correct it with my initials.

MR. KREMBS: I ask the latter part be stricken.

COURT: The latter part may be stricken.

380 BY MR. EISENBERG: As I stated before, with reference to this property, Laneil Management Company was only a bookkeeping operation to receive rent.

381 MR. HUPY: I object. He can ask questions and he can let the witness answer.

Page of
Record

MR. EISENBERG: I am trying to do my best to answer.

COURT: Oh, no, you're not. You are not to be adding to any answers.

383 BY MR. EISENBERG: It is not true that in September of 1969, in response to an inquiry, I gave Dun & Bradstreet information to the effect that Laneil Management Company, 1131 West State Street, was an unregistered style used for general business purposes.

386 COURT: All right, we are ready for motions.

387 MR. HUPY: My first motion is for mistrial. When Mr. Eisenberg was on the witness stand, I indicated to the court that I had a motion to make at the court's earliest opportunity. I think my motion is timely at this time because the jury is excused. Mr. Eisenberg stated he was trying to answer questions to the best of his ability. Your Honor commented - "No, you are not."

COURT: Let me answer you right off that your motion for mistrial is specifically denied. I can recognize as I set here on the bench you are endeavoring in every manner possible to create a mistrial, and this court is not going to have a mistrial. Your motion is denied.

MR. HUPY: Let me state for the record I am in no way attempting to cause a mistrial. My only participation in the trial was when Mr. Eisenberg was on the witness stand.

COURT: I am referring to the whole trial. There have been a number of motions for mistrial. It is denied.

MR. HUPY: Next, Judge, I think when the adverse party calls Mr. Eisenberg to the witness stand during their case, I have a right to ask Mr. Eisenberg questions for clarification.

COURT: The court rules that you have not.

388 MR. HUPY: I will make an offer of proof. The offer of proof would be with regard to Exhibits 7 and 8 which I believe dealt with the lease between Mr. Eisenberg and Commercial Coin Laundry Systems. The offer would be that Mr. Eisenberg did not prepare the document, and he did not state he was doing business as Laneil Management.

COURT: In the absence of the jury, let me state as a practicing attorney for years I drew many deeds, and when the signature appears on the bottom of that deed, it includes everything that is stated above, whether the attorney drew it or did not draw it. You made your offer of proof.

MR. EISENBERG: Are you talking about deeds?

COURT: Leases, the Exhibits 7 and 8, the same thing. Any other offers of proof.

MR. EISENBERG: I have a motion to dismiss.

COURT: Your motion is denied.

MR. EISENBERG: Even without knowing what it is?

COURT: Yes, I already heard the testimony.

MR. EISENBERG: I move for a non-suit.

COURT: Denied.

MR. EISENBERG: Do I understand for the record you do not want to hear what my motion is?

COURT: Your motion to dismiss.

390 MR. EISENBERG: I move for non-suit for this reason, there is nothing to indicate agency in this case, nothing whatsoever in order for this court to permit a case to proceed at this point. I say, it is a travesty of justice that someone can come in and say they talked to a janitor of a building, who did not enter into negotiations with them. Furthermore, as far as Mr. Hornbach is concerned, no one showed Mr. Hornbach's situation whatsoever, as to his position with relation to the Laneil Realty Corporation, which is the company that owned the heaters. Your Honor would not permit me to say the heaters were owned by Laneil Realty Corporation. Certainly for this record, the testimony in this record by the lady who testified as being the sole officer of the company involved stated that her dealing was with Laneil Realty Corporation. She said it because she knew it. So the testimony was that the dealings were with Laneil Realty. Your Honor is bound by this record that Laneil Management Company is solely an accounting or depository. I made that very clear. Your Honor took a Dun & Bradstreet report which was denied and admitted into evidence, and the report itself says the information was declarant. This attorney has the temerity to read a credit report. Your Honor is so careful about the photographs, you wanted the photographer to come down, then your Honor permitted Mr. Krembs to read an unverified credit

report from Dun & Bradstreet. It was declarant information, and I submit that even though I am an attorney, that does not turn me into a second-class citizen. I am entitled to be treated like anyone else in the Courtroom. I submit this is unfair, even on the basis of the credit report. It says his information is declarant, and it also says it had one employee, and that person is the bookkeeper. I make it clear Laneil Management had no right to enter into any agreements. On the basis of the testimony, what have you got in the case? You have very considerable. First of all, you got a company that ran in and ran a pipe line. There isn't rhyme or reason for what was done here. I submit further what you have here on the lady's own testimony she knew that the work was done between Laneil Management and Margis.

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COURT: Your motion for non-suit is denied, and the reason the court gives, the case is going to the jury.

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DIRECT EXAMINATION OF ROBERT WESTFALL BY MR. EISENBERG:

My name is Robert Westfall and I am janitor of the buildings at 803-813 East Wells Street. I have been such for 11 years. I work for Laneil Realty which I believe is a corporation. I was under the impression that Mr. Eisenberg owned the buildings.

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I recall the job in question here. During 1967, 1968, or 1969, someone from Margis Plumbing and Heating came to the buildings. These buildings are not joined in any way, there is probably thirty feet between them. There is no archway or anything like it between them. There is only my tomato patch between them and a flower garden.

There are also some picnic tables.

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With reference to the gas regulators, they were installed by the gas company prior to 1968. We had two working boilers in there utilizing hot water heat. New heaters arrived - they came in crates. These were to be placed inside the buildings to the place where the Gas Company had installed lines. The Gas Company had placed regulators and piping into the laundry room. Exhibit 3 is an exact replica of the regulator on the side near the laundry room. On the other side of the wall, they put a shut-off to go down to the heaters. I was present when the Gas Company put the regulators in. We already had gas pipes coming in from outside the building. We also had water inside the laundry room. The laundry room is just inside the building with reference to the regulators. To the rear of the laundry room was storage space measuring 60 by 30. A lot of boilers could be placed in that space.

I have been working on boilers for forty years and I think I know something about them. I certainly know how to turn them on and off.

When the new pipe was hooked up by Plaintiff, they hooked it to the shut-off the Gas Company installed for the heaters. The wall there is about a foot thick. The Gas Company had put the pipes through the walls. Plaintiff hooked these pipes to the opposite wall across the laundry room and across the hall. The pipe is in plain view.

When the Plaintiff's people arrived, they asked me where the heaters were. I told them they had just been brought inside the building out of the snowstorm. The man that came said he

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was a master plumber, he now testified he was a journeyman plumber. His name is Edward Margis. No one else came that day. He said he wanted to know where the heaters were. I showed him they were not completely uncrated yet. These people identified themselves as Margis Plumbing and Heating, but I didn't know them. They wanted to know where we had the heaters. I asked if they had a contract and he told me that was taken care of by his brother. I then showed them the laundry room and where the shut-off was. The following day or two days later, they arrived with a whole lot of pipes. Just then my wife called and I went home while they started running the pipes.

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I then contacted Mr. Eisenberg's office and then Margis' office, which was on Ogden Avenue at that time. I talked to Dick Margis. I told him to stop work until things get straightened out, which he did. The heaters were placed on the outside of the buildings rather than the courtyard side where I thought they were to go. I pointed this out to the plumbers. I told them the heaters should go in the laundry room by the wall next to the regulators. I then showed them where the heaters had been stored and helped them move some refrigerators out of the way. Where these refrigerators had been standing, just to the right of the shut-off is where I thought the automatic heaters were to go. In the laundry room was the gas line and individual meters for all the apartments.

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Exhibit 3 shows the gas pipe coming in from the regulator after Margis Plumbing and Heating people were there. Exhibit 5 shows the pipes across the laundry room. The pipe runs clear across the laundry room, through the hall to the boiler room. The size of the pipe is reduced down from one size to another.

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There is a regulator on the other side of the building also.

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I didn't tell anyone from Margis Plumbing and Heating where to put the heaters. I merely showed them where we planned on putting them, which was next to the laundry. I told this to Mr. Margis and one of his helpers. That was at 803-813 East Wells. The man I told was Ed. I have only seen him one time before, that was when they did work at the Sydney Hotel. The Margis brother's father was alive at that time.

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On three occasions, I told Margis' people to leave, but I only went to the office once to make a personal plea. At the office I talked to Dick. I only saw Dick on that one occasion. He was also there when he came with Mr. Hornbach to talk prices. I do not know if he gave Mr. Hornbach a written statement at that time. I do not know if any changes were made in building plan or work with reference to the heaters after that initial meeting.

CROSS EXAMINATION OF ROBERT WESTFALL BY MR. KREMBS:

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In 1969, I resided at 813 East Wells Street. I resided there for the entire year of 1969. I was the janitor of the premises then. I resided there all the while the plumbing work was being performed by Margis. I was not always on the premises as I had other work, other buildings to look after. For a period of time each day before I went elsewhere, I did janitorial work at 813 East Wells. At various times during February,

March and April of 1969, I observed employees of the Plaintiff working.

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REDIRECT EXAMINATION OF ROBERT WESTFALL BY MR. EISENBERG:

When I saw the employees, I asked them to leave until they got clarification as to where the equipment was supposed to go.

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RECORD-EXAMINATION OF ROBERT WESTFALL BY MR. KREMBES:

I told the employees to leave, a period of time elapsed and they came back on the job.

REDIRECT-EXAMINATION OF ROBERT WESTFALL BY MR. EISENBERG:

When they came, I told them I had no word of clarification and I asked them to contact the office. When I asked them to leave on this basis - they said see my brother. This happened three to five times.

DIRECT EXAMINATION OF R. WALTER GROSS BY MR. EISENBERG:

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My name is R. Walter Gross and I live at 6829 North Ironwood Lane. I am an engineer and also a construction consultant. I am here under subpoena. I am a graduate of Marquette University and I hold an M.E. degree, mechanical engineering which I received in 1945. Since 1938, I have been involved in the construction field. During this time, I have built about two thousand units, both residential and commercial and factories, industrial work. I have also built apartments, condominiums and residences. I do this for J.C. n

Waxman, upon whose staff I am a construction engineer. I also do a considerable amount of private work. John Waxman has been a customer of mine for about seven years. I have had occasion to design and build buildings in the Milwaukee area. I have laid out mechanical plans for heating and hot water.

On two or three occasions, I have visited the buildings on East Wells Street and have looked at the hot water system and the two tanks.

I am a graduate engineer doing business with reference to heating installations for an excess of forty years. Throughout these years, I have been involved in the construction of over two thousand buildings.

In the course of my work, I have viewed the heating installations involved here. I would say they were improperly installed in this respect, the heaters should have been installed from every aspect right near the regulators for this reason; Number One, the longer your pipe is the more you are opening yourself up to maintenance problems; Two, its cost is considerably more, and also hot and cold water is right in this laundry room.

If the installation would have been properly done, it would have required maybe five feet of gas piping and about ten feet of hot and cold water piping. That would have cost about \$1.50 a foot installed in 1969. That is for the gas piping. If you multiply Five feet at \$1.50, you would have \$7.50. Multiply this by four heaters and you would have a bill of about \$30.00 in 1969, for the gas piping. This included labor. As to

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the other pipe, being galvanized that would be \$2.00 of foot for inch and half, some places two. It would need about 10 feet per unit, so that would be forty feet. Thus, this would be about \$80.00. Add \$30.00 for gas piping and \$4.00 for a plumbing permit and the bill would be \$114.00

MR. EISENBERG: I assume that you can use the permits of Iron Fireman?

MR. GROSS: Yes.

COURT: The last part of the question is adding something that is not in the record.

MR. EISENBERG: It will be in the record, I will put it in the record.

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COURT: Mr. Eisenberg, you are a capable lawyer, but you are taking advantage of us here.

MR. EISENBERG: I am trying to save having Mr. Gross come back.

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BY MR. GROSS: In addition to that bill, you might have to add some nipples, couplings and so forth. These would cost about \$50.00 per heater. This would bring the total to \$310.00. I can't think of anything further that would be added.

There is no way one could presently use the boiler room without vacating the pipe. I would say the boiler room is approximately 1000 square feet. Under State law, one has to have cross ventilation.

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I am acquainted with the area of these buildings. They are about a block from Northwestern Mutual Life building, and about two blocks from

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the First Wisconsin Center. It is about a block and a half from the lake. The building is solid masonry with a brick exterior. It appeared to be well maintained.

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I am familiar with the equipment in the building now. The water heater is compact. It is small and automatic.

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I was in court when Ed Margis testified and I heard him say it would take about twenty hours at \$15.00 an hour to remove the pipe. Thus, it would run about \$300.00 per building.

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I had an opportunity to look at the plans for these buildings. Exhibit 7 I have seen previously. These plans appear to be the two buildings involved here. They are not joined by any arch.

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I am acquainted with common practice engaged in the building business. I am also acquainted with these practices as they were in 1969. I have had experience in respect to the relationship between contractors and owners. I am also familiar with lien laws.

* * * *

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MR. EISENBERG: May I ask the court what the reason is for sustaining it. The complaint says they are asking for it. I have a right to ask if it is a fair and reasonable value.

COURT: Objection sustained.

MR. EISENBERG: May I just ask what the grounds are?

COURT: Invading the province of the jury.

CROSS EXAMINATION OF H. WALTER GROSS BY MR. KREMBS:

438 I first looked at this property in 1969, and then again last year. Finally, I looked at it about a week ago. I know nothing about the transaction between Margis and Laneil Management, but I do know what I saw on the installation and I do know what instructions were given to the Margis' workers.

440 DIRECT EXAMINATION OF FREDERICK J. HORNBACH BY MR. EISENBERG:

441 My name is Frederick J. Hornbach, except for service I have lived in this community just about my entire life. I have been a member of the American Legion. I started in the construction business in 1939. My father was in construction and my grandfather an engineer for the City of Milwaukee. I am familiar with construction work.

442 I am aware of some buildings that Mr. Eisenberg owned for twenty or thirty years. There are several corporations which own several buildings of which I am responsible for maintenance and general welfare. These buildings are 770 North Marshall, 803-813 East Wells, 1029 East Knapp Street, 1646 North Prospect Avenue, Biltmore Apartments at 13th and Wisconsin, 1201 West State Street, where we have some smaller buildings, trucking terminal. We also have the Sydney Hih project which we just donated to the March of Dimes. I have an interest in the various corporations.

I am a college graduate of Ripon College. I have a B.S. degree and also an Armour degree in

engineering in electronics. We have discussed plans for improving 803-813 East Wells.

* * *

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The building is ground floor level, it has no basement. The new hot water heaters were to go adjacent to the new gas lines brought into the building. These was located between the two buildings which are rectangular. The Gas Company installed this line. They also installed two new regulators.

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Margis apparently hooked into this pipe, but instead of placing the heaters there, the pipe runs a little bit south makes a right turn goes clear through the laundry room and through the top of the boiler room. The pipe is 7-6, 7-2 above the ground.

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I did not direct Margis' people where to put the pipe in. I figured that was not necessary. I did not direct them to make the installation of these pipes.

COURT: Wait a second, what is your objection.

MR. KREMBS: My objection is that counsel in asking the witness to identify this Exhibit did not include in his question the date of that Exhibit.

MR. EISENBERG: I don't know if I need his help to ask questions.

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COURT: That may be stricken from the record. Please don't argue. Ask your question. I am going to sustain the objection.

BY MR. HORNBACH: I got the written proposal of June 22, 1967, shortly after the date of the contract. I went with Margis to look at the job before the date of the contract. Margis must have met me several times. I met in the lobby with Mr. Margis and Mr. Westfall. This was approximately a week to ten days before we received that proposal. It was the first week of June, 1967. The next contact was when I called him in 1969. After receiving the written proposal in 1967, Laneil Realty Company, a corporation, went out and got two heaters. They were purchased around October 31, 1968.

* * * *

453 I now told Margis to proceed to hook up the water lines at any time. On several occasions, I asked his men to get off the job until we got this thing clarified and straightened out, because I had no proposal or anything in writing or authorization. I have no writings on this or with regards to the pipe lines.

454 I have been with Mr. Eisenberg for a little
455 over 10 years. I have no authority to tell Mar-
456 gis to go ahead and do any work on the premises.
I do recall calling Richard Margis. Over the
years, I must have called him five or six times.

The first time I called him was in 1967, with reference to hot water heaters for installation in 1967. The next time was in 1969, I called him for a conference. This was to see what it would cost to install these hot water heaters. They were just going to do the piping for the hot water heaters. He was going to give me a proposal - next thing I knew his people were on the job.

At that time, I was engaged in some other building and I couldn't get there immediately.

On several occasions I told Margis' men to leave the job. They would leave, they would be gone a day or two, then the next thing I knew, they would be back again. I didn't tell them to go ahead after they were sent off the job. I then talked with Mr. Eisenberg and we ordered Mr. Margis' crew off the job. I never told them to come back until the matter was straightened out and it never was. By straightened out, I mean until we got a written proposal.

The reason I called Margis in the first place was I knew his father personally, he had done some work for us.

* * * *

The day these people got on the job I knew they were going ahead with whatever they were doing. Bob Westphal had called me.

MR. KREMBS: Objection hearsay.

COURT: Objection sustained.

MR. EISENBERG: Just calling him is not hear-
say.

COURT: He may answer.

BY MR. HORNBACH: After he called I called Margis and tried to get the men off the job. That same afternoon I went over to the building. The installation was not going where it was supposed to, so we had Margis' men go off the job. I didn't tell them they could do any work at all.

I met with him to get a proposal, but we never received a proposal of any sort as to time and

material. I never told Margis that Sydney M. Eisenberg was going to pay for his work at any time.

* * * *

466 The walls of the building are masonry construction walls. It has nothing but fire stop which means it has the Underwriters Label on it in use of fire. We have been using that for ten years or more.

* * * *

468 There is hot and cold water in the building's rooms. So in reference to planning apartments, we have plumbing to hook fixtures onto. It has walls, ceiling, a floor and it was a corner of the building on the first floor. It has 1000 square feet. Each building contains 20 odd apartments. I have built rooms.

* * * *

471 I was present in Mr. Eisenberg's office when Mr. Margis came in. That was after I sent him a letter at Mr. Eisenberg's request saying we were not going to pay him. It contained a demand for an itemized statement and a demand to know Margis' authorization. Margis said he got the authority verbally from me. I told him he received no verbal authorization from me. Mr. Eisenberg asked him where he got the bill. He had given us a bill without itemization. I believe the discussion was to remove the pipes immediately. Mr. Eisenberg and myself both told him to remove the pipes.

474 There were apartments on the first floor. There are approximately three apartments on each

floor ahead of what was formerly the boiler room.

475 It was part of my duties to determine vacancy and occupancy. I get daily reports on vacancy and occupancy. Rent depends on the size of apartments. One apartment is in the neighborhood of \$135.00 with heat furnished. They were renting at that figure. I was not able to complete a one bedroom apartment in the boiler room area due to the pipes running in the area. A six foot person would be in danger of hitting his head.

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* * * *

482 The material installed on that job by Margis; has no value to us.

* * * *

485 CROSS EXAMINATION OF FREDERICK HORNBACH BY MR. KREMBIS:

486 I personally visited the premises of 803-813 Wells Street in 1969, while the work was going on, on several occasions, I went there at least two or three times a week in the course of my normal duties as business manager. On these occasions, I would sometimes find Margis' men working and sometimes not. On at least three occasions, I told Margis' men to get off the job. Each time I found them on the job again.

488 I recall the meeting with Mr. Eisenberg, Mr. Margis and myself. There was also a representative of Iron Fireman whose name I don't recall. At this meeting, there was discussion of the Margis' bill. As to Exhibit 5, the invoice, Margis' may have brought it along. I don't specifically recall seeing a copy.

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I don't recall if during their discussion, Mr. Eisenberg asked for an itemized bill. I don't remember the exact date of the meeting. I recall that Exhibit 6 was received at our office.

* * * *

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At this meeting, there was a discussion. Dick Margis presented his bill and there was a discussion with Mr. Eisenberg concerning their charges.

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REDIRECT EXAMINATION OF FREDERICH HORNBACH BY MR. EISENBERG:

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Mr. Eisenberg said he wanted to get the pipes out. I had no difficulty hearing that statement, it was said loudly. Mr. Eisenberg never said he would pay Margis \$1,500.00 or \$5.00 or \$10.00 or \$1.00 or any amount. I never agreed to pay anything either. I also wrote a letter to meet at Mr. Eisenberg's office.

MR. KREMBS: I object. This individual is incompetent.

COURT: Objection sustained.

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BY MR. HORNBACH: There was communication between Margis and I in the form of a letter.

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DIRECT EXAMINATION OF SYDNEY M. EISENBERG BY MR. HUPY:

My name is Sydney M. Eisenberg.

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COURT: Before we go any further, I want to say to you, Mr. Attorney, if you are going to question this witness, and I want you, Mr. Eisenberg, to answer the questions, and don't be adding to the testimony. You are submitting answers. You know you are not allowed to do that.

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BY MR. EISENBERG: I am 59 years of age. I was born June 20, 1916, at 517 Saint Germaine Street, Milwaukee, Wisconsin. I am an attorney and I own real estate. I have invested in real estate since I was 20 and I have owned real estate for over 30 years. I was admitted to practice law in 1939. I went to law school at Marquette University where I graduated in 1939. I presently have stock in corporations owning Prospect Heights Company, Charlan Manor Company, Knapp Street Realty Corporation. I don't know whether or not 12th Street Realty Company is still operating. Laneil Realty Corporation. I also help put together and own through corporation, the Sydney Hih project.

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502 COURT: Wait a second, we are going to stop right here. I am sick and tired of your orating to the jury and deviating from the question. If you can't keep your attorney in line, then the court will keep him in line.

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DIRECT EXAMINATION OF SOPHIA P. O'NEILL BY MR. EISENBERG:

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My name is Sophia P. O'Neill. I have brought certain records with me. They are articles of Incorporation of Laneil Realty, a Wisconsin Corporation. These have been on file since November 6, 1949, when they were executed. I found no records of Laneil Management Company.

CROSS EXAMINATION OF SOPHIA P. O'NEILL BY MR. KREMBS:

I could not find Laneil Management Company in the Register of Deeds office under corporations.

COURT: What is your motion?

MR. EISENBERG: My motion is that the court correct what he said.

COURT: All right, the court will make whatever statement is necessary for the jury. Have you any other motions? You are not getting a mistrial in this case.

MR. EISENBERG: If the court please, I cannot be sure this is being put into the record.

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COURT: It is, I have never tried a lawsuit in which the lawyer was so irritating as you have been in this case. You do not follow the court's rulings, you don't follow the court's direction, you continue to argue and discuss matters that are not pertinent to your direct answer. I want to say that it is the opinion of the court that you wanted that mistrial, and I want this on the record, as far as this court is concerned, I was appointed in this case after you have had a previous mistrial, and I am going to try to get this lawsuit to conclusion by submitting instructions to the jury. You said you had an offer of proof, now, let's have the offer.

MR. EISENBERG: I would like to go on record.

COURT: I am not going any further on that.

MR. EISENBERG: I am going to file an affidavit.

COURT: It won't do you any good to file an affidavit of prejudice.

MR. EISENBERG: I think your Honor is intending to make sure there is no mistrial.

COURT: The court is trying to keep its temper down, and you have completely ignored everything the court has been telling you, and paying no attention and doing just as you please, and now I ruled. If you have an offer of proof or something, make it now.

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MR. EISENBERG: I am going to move on this record I believe the court has made many rulings that were not irrelevant. The court has sustained us on expert testimony. The value of the claim that was introduced by Plaintiff, we offered to prove, if the court would permit us, that Mr. Hornbach is an expert in the field of heating.

COURT: And he did testify to it.

MR. EISENBERG: He did testify not only to the field of heating but in the field of building and construction, and is fully informed.

COURT: He did testify to it.

MR. EISENBERG: He did testify to keeping the apartment. The record would reflect. I am not going to say any more.

COURT: Your offer of proof is denied.

MR. EISENBERG: My offer of proof is on the subject of construction to keep that apartment. I didn't go out and pay \$14,000.00 for heating equipment for nothing.

COURT: Make your offer of proof and no argument.

MR. EISENBERG: We spent approximately \$14,000.00 for heating equipment, to remove the equipment so that an apartment could be put in.

COURT: You are not finished on the witness stand yet. We will continue tomorrow at 9:00 A.M.

DIRECT EXAMINATION OF SYDNEY M. EISENBERG BY MR. HUPY:

509 Laneil Management Company is an operation that only effects collecting. It does not do any other type of collection. It does only a book-keeping operation.

* * * *

512 513 MR. HUPY: Would you state whether or not you ever authorized the Ed Margis Plumbing & Heating Company, Inc. to do jobs for buildings you own, or corporations you had an interest in?

MR. KREMBS: Objection, immaterial and irrelevant.

MR. HUPY: This whole lawsuit has to do with whether there was a contract or not.

COURT: Objection sustained.

514 BY MR. EISENBERG: Fred Hornbach has no authority to enter into any contract to have work done without talking to me. This applies to contracts with Ed Margis Plumbing and Heating. Fred Hornbach's duties were to check the buildings from a safety standpoint and from a maintenance

standpoint, and to see that these janitors are working. If I called in outside contractors, he would have our men work alongside. He was not a purchasing agent. I never told anyone from Margis that Fred Hornbach had any such authority to enter into contracts.

517 Bob Westfall was the janitor at 803-813 East Wells. His job was to keep the halls clean there. He had no authority to enter into contracts.

* * * *

I never authorized Margis to do the work. When I found out they did the work, we had a conference in my office. Present were Richard Margis, Fred Hornbach, myself and gentlemen from Iron Fireman.

* * * *

When I talked to Mr. Margis at this conference I said - I got a bill here for Thirty-three hundred dollars, and Mr. Hornbach said he was trying to stop you from doing this. What's this all about? He had a statement in his hand which was not itemized. I said - what's this all about? He said - we ran a line from the control on the other side of the building over to the boiler room, and I said to him - there's gas in the boiler room and water in the boiler room. Why the devil did you run a line from the opposite side of the building in a place you already have heaters. Why did you run a line across the building and give me a bill for Thirty-three hundred dollars when there was already water. I said - was there water, and he said, yes. Then I said I'll give you half the bill, and furthermore, who told you to go in there in the first place. There was gas in there already.

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He didn't say anything, and I said, look, I'm not going to be taken, and he said - We got a pretty good lawyer, and I said, who is he, and he said, Mr. Krembs, and he can take you, and then I said, let him, if that's the way its going to be, I'm not afraid, and he said - the newspapers don't like you. I said, fine. I'm still fighting bigotry, I'll still say what I think, and I don't owe you anything, so take your pipes out of there. I don't know what they are worth. Please remove them. I am talking about 50 feet of pipe. You gave a proposal, which I never signed. The proposal calls for 1400 feet with heaters. Apparently we got our own heaters because we didn't want to give you the job. I don't know you, I knew your dad. He was a wonderful man and did a good job. I don't know why you came up with a Thirty-three hundred dollar bill. I told him to get his things out of there. I was talking about Two hundred dollars. I didn't want it hooked up where he wanted it to go, the reason I explained. I told him I was told by the Gas Company it couldn't be placed anywhere. These gas heaters can be placed anywhere, they are automatic small heaters, they can be placed anywhere. Why did you do some things like this, and running up a Thirty-three hundred dollar bill if it were honest. He said - we can collect that anyway. We'll get the money.

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We planned on using the room for another apartment. Cost at that time to construct it would be about \$2,500.00 The going rate for such apartments was \$135.00 per month. We have an occupancy rate of 95% to 98%.

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The way the Margis people constructed the pipes, it is not safe.

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CROSS EXAMINATION OF SYDNEY EISENBERG BY MR. KREMBS:

The meeting described above took approximately a half hour. During this time, Mr. Richard Margis was there. After he left, we continued to talk about him. I categorically deny asking Richard Margis to cut his bill in half.

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TESTIMONY OF RICHARD MARGIS BY MR. KREMBS IN REBUTTAL:

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I spent only about 10 minutes in Mr. Eisenberg's office. During that time, I was requested to cut my bill in half. I made no statements about having a tough lawyer. During this meeting, Mr. Eisenberg did not tell me to take out the plumbing work.

RECROSS-EXAMINATION OF RICHARD MARGIS BY MR. EISENBERG:

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Mr. Krembs was my lawer at the time of the meeting at Mr. Eisenberg's.

TESTIMONY OF FREDERICH HORNBACH BY MR. EISENBERG:

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The conference at Mr. Eisenberg's lasted 30 minutes.

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MR. EISENBERG: We have some motions to make.

MR. HUPY: Judge, I had not completed our record on offer of proof.

COURT: What do you mean you have not completed it?

MR. HUPY: I think there were four offers of proof, we only had time to make one.

COURT: If you have another offer of proof, come up and make it.

MR. HUPY: Judge, with regard to the testimony of Robert Westfall, he was not allowed to state what authority he had in regard to purchasing items for Mr. Eisenberg on any corporations he was associated with. Our offer of proof would be if Mr. Westfall would be allowed to testify his testimony would be he had no authority to purchase anything for Mr. Eisenberg or any of his corporations, or to enter into any contracts for Mr. Eisenberg or any of his corporations.

COURT: Very well.

MR. HUPY: Our second offer of proof is in regard to R. Walter Gross called by the defendant, I believe the court precluded us from asking him whether or not it was common practice in the plumbing industry to have a written contract for work to be done, and his testimony would be in this offer of proof that it was the practice of the industry to have a written contract, not a verbal agreement for plumbing work that was to be done. Also, in regard to Mr. Fred Hornbach, he was not allowed to testify as to the plans he and Mr. Eisenberg had for the boiler room. His testimony

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would be the same, if he were allowed to testify, as Mr. Eisenberg did, that they were going to put a one bedroom apartment in each building. In regard to Mr. Eisenberg, he was not allowed to testify as to certain plans and agreements he had with Iron Fireman. His testimony would be, the work, or at least part of the work that was supposedly done by Ed Margis Plumbing & Heating, it was agreed between Mr. Eisenberg and Iron Fireman that Iron Fireman would do it. Also, in regard to Mr. Eisenberg's testimony, if we were allowed to do so, which we are not, we would prove through his testimony that he was the only person who was authorized or who had the authority to enter into contracts for plumbing for himself or for any of the corporations which he was associated with, which owned real estate, that it was his policy at all times to have a written contract, and that his past dealings with Margis always involved written contract and not oral agreements, and were all on time and material basis by definite price. That concludes our offer of proof, Judge. At this time we would like to renew the motion we made at the beginning of trial. We have a statement from the Secretary of State's office stating that the Ed Margis Plumbing & Heating Co., Inc. is not now in good standing, and we would move at this time to dismiss this case because I think under the statutes of the State of Wisconsin, even if the company is in good standing at the time the suit is commenced, if they are not in good standing, they are no longer able to come into court to be sued.

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COURT: Do you have a certificate from the department?

MR. HUPY: Yes. I do. It shows they are not in good standing.

COURT: They filed an annual report for 1973. Your motion is denied.

MR. HUPY: All right, that's it.

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COURT: And you are moving at this time to dismiss the complaint?

MR. EISENBERG: Yes.

COURT: Your motion is denied. Also, the case will be decided by the jury. Now, Mr. Krembs, how long do you want to talk to the jury, approximately; I am not going to limit you here at all.

MR. KREMBS: A half hour.

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MR. EISENBERG: We object to the second question. The question is whether or not Frederick Hornbach had authority as general property manager to enter into an agreement with the plaintiff, and then the next question would be - Did Frederick J. Hornbach hire and direct the plaintiff to do the work.

COURT: Let's take Question 1: Was Frederick J. Hornbach in the employ of Sydney Eisenberg, doing business as Laneil Management Company as general property manager of buildings at 803-813 East Wells Street? If you answered Question 1 "Yes", then answer the following: Question 3, that is the same as it was before.

COURT: Let the record show Mr. Eisenberg requested the special instruction.

* * *

MR. HUPY: I think we made a request that the argument of counsel be taken down. That request was denied Mr. Eisenberg. We renewed that request after objecting to objectionable argument by counsel. We requested to have those comments taken down, and it was again denied.

COURT: That's right.

MR. HUPY: We want the record to reflect that. Let the record reflect the court reporter was out. The judge ruled that the objection be denied. We also object to several of the jury instructions.

COURT: Let the record show with regard to the jury instructions the court informed each one of the attorneys to prepare any request for instructions or for the special verdict, and they failed to do so, and the court therefore stated that it was making its own instruction, and further, the special verdict questions were agreed to by Mr. Eisenberg and Mr. Krembs.

563

MR. HUPY: Can I complete my record on the instruction? The first instruction we object to is the court's instruction on agency. I feel the instruction itself was slanted in favor of the plaintiff. It stated certain conditions under which the jury should find that an agency relationship existed, but does not conversely state circumstances or situations by which the jury should find such relationship.

COURT: The court is not calling back the jury.

MR. HUPY: The second objection we have to the instruction, the quantum meruit instruction on the issue. This was a contract case, it was

Page of
Record

started as a contract case and tried as a contract case.

COURT: No, sir, that motion is also denied on the grounds there was testimony by Mr. Margis to the effect that he refused to make a speculative bid on it if the work was going to be done for time and material. Motion is denied.

MR. HUPY: The last objection we have to the jury instruction, the court instructed the jury on loss of future profits. We are not claiming loss of future profits we are claiming profits up to the day of trial.

COURT: Future profits is what you are asking for. That is the legal instruction in the book on profits. That is the one that stands.

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